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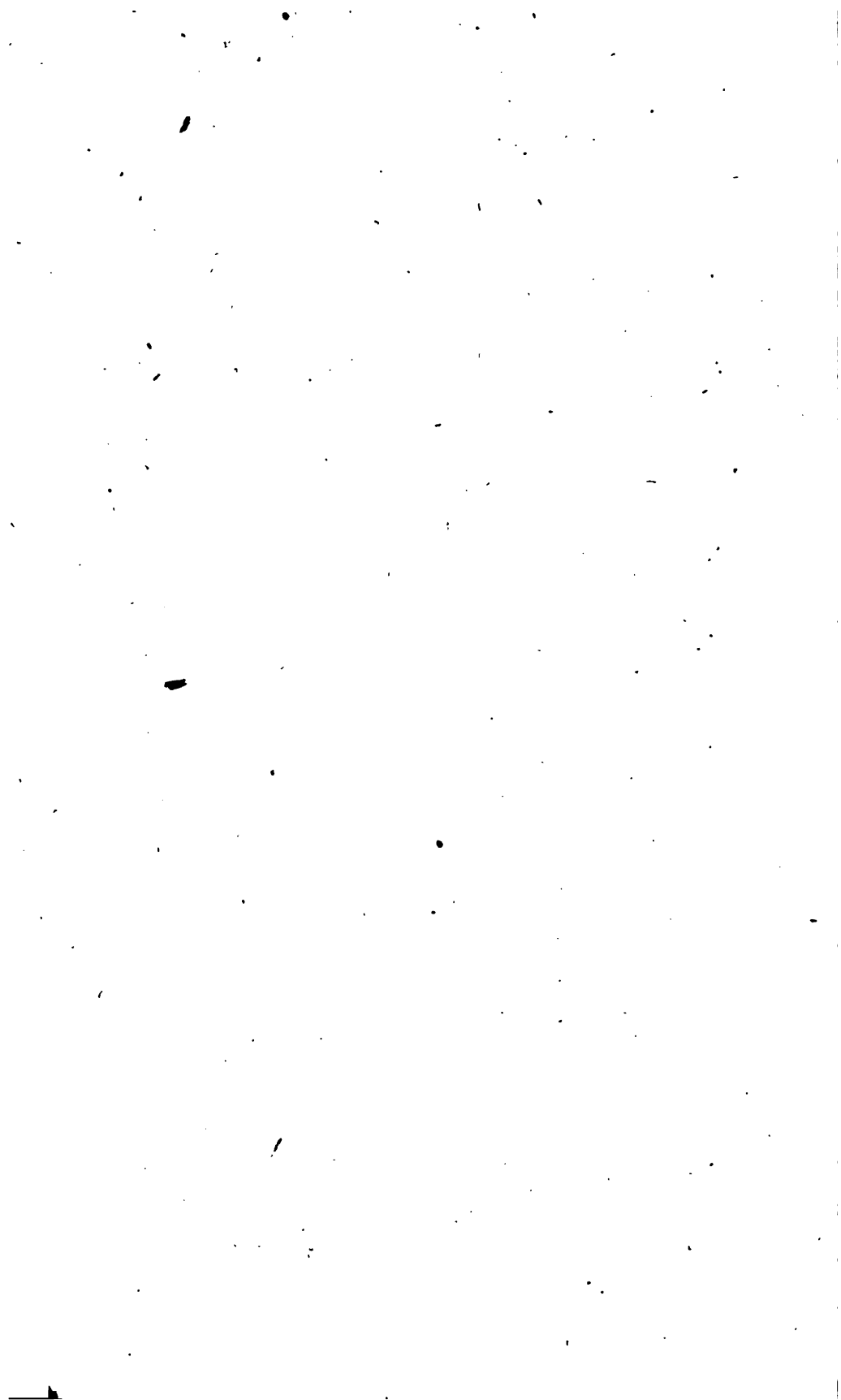
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A
GENERAL ABRIDGMENT
OF

Law and Equity,

ALPHABETICALLY DIGESTED UNDER
PROPER TITLES;

WITH NOTES AND REFERENCES
TO THE WHOLE.

BY CHARLES VINER, Esq.
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY
OF OXFORD.

FAVENTE DEO.

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A T A B L E

OF THE

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and Subdivisions.

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Common.

(Z) Of stinting and Inclosure of Commons otherwise than by the Statute of Approvements.

1. UPON a bill for title, of common, and to have certain lands inclosed laid open, it was decreed, that the defendant and his heirs should hold the lands so inclosed discharged of common, because it seem'd that the inhabitants had common enough besides, and that the laying open the lands in difference would be a great decay of husbandry. Toth. 118. cites 36, 37 & 38 H. 8. Daniel & al' inhabitants of (Cudworth or) Crudworth in Warwickshire v. Ardern.

2. It is decreed the plaintiff, his heirs, and his or their farmers of the said farm or tenement called Stubbles, shall from henceforth hold and enjoy appendant to the same farm or tenement called Stubbles all the same fould, course or common of pasture for the full number of 300 sheep, within the Field of Wentworth al' Wenford. Cary's Rep. 65. cites 2 Eliz. fol. 137. & 155. Bafill Fielding and Alice v. Wren.

3. The suit was for common of pasture and turbary, the defendant demurred, for that the plaintiff may have remedy at the common law, but ordered to answer. Cary's Rep. 91. cites 19 Eliz. Lawrence and Moregate & al' v. Windham.

4. The plaintiff's suit is to be relieved for a common, and a subpoena is awarded against the defendant to shew cause why an injunction should not be granted to stay the suit at the common law. Cary's Rep. 118. cites 21 and 22 Eliz. Chock v. Chea and Wast.

5. Lands that had been inclosed for 30 years by consent of most of the parishioners, were therefore ordered to continue inclosed. Toth. 174. cites 4 Jac. Piggot v. Kniveton. *A common that has been inclosed for 30 years,*

shall not afterwards be slung open. Vern. 32. pl. 29. Hill. 1681. Silway v. Compton.

6. Inclosure of common is a private wrong, and no publick nuisance, and presentment at the Leet is void. 9 Rep. 113. Trin. 10 Jac. in Robert Mary's case, cites 27. Aff. 6.

7. Inclosure of waste and common decreed being for the common good. Toth. 175. cites 12 Jac. Freak v. Loveden.

8. The court compelled certain men that would not agree to inclosures, to yield unto the same, and binds a college that would not consent, having lands within the said manor so inclosed. Toth. 174. cites Mich. 17 Jac. Cartwright v. Drop. *9. P. Toth. 174. cites P. 10 Jac. Magdalen Coll. in Oxon. v.*

Hde. — Toth. 175. cites 8 Car. 2. P. Barkley v. Ewet.

9. A decree made to overthrow inclosures, if the defendant will not recompence the plaintiff so much as he hath been prejudiced by the inclosure, being a depopulation, altho' a remedy at law upon the statute. Toth. 175. cites Mich. 20 and 21 Jac. Trigg v. Payte.

10. Inclosures with gaps is an inclosure. Litt. R. 267. Pasch. 5 Car. C. B. Poston v. Utbert.

11. If a man incloses where by the law he may, he is bound to leave a good way, and also to keep it in repair continually at his own charge, and the county bought not to be contributory; said by the judges to have been so adjudged. Jo. 296. 8 Car. in Itin. Windsor. Henn's Case.

[2] 12. The defendant agreed to an inclosure, but afterwards dissented. Decreed according to the agreement. Toth. 176. cites 13 Car. Fox v. Shrewsbury.

13. Parties that have interest in the common, and not privy to the agreement to inclose, shall not be bound; but decreed that it should not be in the power of one or two wilful persons to oppose a publick good. Chan. Cases 48. 16 Car. 2. Thirveton v. Collier.

3 Chan. Rep. 13. Anon. but S. C. in totidem verbis.

Nell. Chan. Rep. 79. 16 Car. 2. Anon. but S. C. in totidem verbis.—The court will not bind a man to an inclosure that never consented. Toth. 175. 2 Car. Ingram v. Wells.

An agreement for inclosing lands was confirmed by a decree against several, and against the parson of the parish; the terms offered him being much more advantageous, and he and his successors bound us to the tithes. Finch's Rep. 18. Mich. 25 Car. 2. Edgerly v. Price & al'.—S. P. Toth. 175. cites 5 Car. New-Elm Chapel v. Erbury.

14. Bill is brought against the parson, he being the only freeholder within the manor, to compel him to consent to an inclosure. The defendant demurs, for that there are no articles of agreement to compel an inclosure, nor doth the bill charge that the defendant is like to receive any benefit by the inclosure towards the benefit of the church, and that although he be the only freeholder within the manor, in right of his church, yet the same is no ground in equity to compel him to an inclosure. This court, as to the compelling the defendant to agree to an inclosure, allowed the demurrer. Chan. Rep. 259. 17 Car. 2. Constable v. Davenport.

15. Upon an inclosure lands were allotted by an agreement with the predecessors of the parson for lands before belonging to the church; the parson brought a bill for an execution of this agreement. The defendant insisted on after agreements with other parsons, and on an award between one of them and one of the ancestors of the defendant, and confirm'd by decree of this court: On the proofs and answers of this and former causes, the court decreed for the plaintiff, and a commission to set out lands. Fin. R. 144. Mich. 26 Car. 2. Unwin & Fawnt.

16. If a commoner recovers damages at law, as 1s. or other small sum, for an oppression, or for using the common where he ought not, the defendant may, by bill, pray that any other commoner may accept like damages for what was past, to prevent charges at law; and it is in nature of a bill of peace. By North K. Vern. 308. pl. 302. Hill. 1684. in the case of Pawlet v. Ingrefs.

17. A com-

Common.

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17. A commoner ought not to come into chancery to *examine in perpetuam rei memoriam*, to prove his right of common, till he has recovered at law in affirmance of his right; by North K. Vern. 308. pl. 302. Pasch. 1684. Pawlet v. Ingreffs.

Right of common is too trivial to examine to and not allowable,

at least till after a recovery at law; per North K. for the examination costs more than the value of the thing. Vern. 312. in pl. 308. Hill. 1684.

18. A former decree, and an award by which the *commons and inclosures* between the lord and his tenants, and lands in the bill mentioned were *bound and ascertained*, till the defendant, who had now purchased the manor, refused to be bound by it, was confirmed accordingly. Fin. R. 154. Mich. 26 Car. 2. Meadows v. Patherick.

19. A *decree made for an inclosure 20 years since*, to which the defendant, the lady Widdrington's husband, had agreed in his life-time, and she having an estate of about 25 l. per ann. within the manor, would now disturb the inclosure; and tho' in strictness her husband's consent could not bind her interest, yet it being proved in the cause that her estate was much improved by the inclosure, and that she designed only to make an unreasonable advantage to herself, the court decreed the inclosure should stand. Vern. 456. Pasch. 1687. Rothwell v. Widdrington.

S. C. cited 2 Vern 2254 in pl. 206.

20. *Agreement between lord and tenants to stint a common*, is more to be favour'd than to inclose; and 1 or 2 humourfome people standing out, and not agreeing, will not hinder the court's decreeing it; and decreed accordingly. 2. Vern. 103. pl. 98. Trin. 1689. Delabeere v. Bedingfield.

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But where such agreement was made by the greatest part of the landholders,

and opposed by the rest, and about 9. others, the court could not decree it, though it was insisted in a decree was made 1. W. 3. for a like stine in the hamlet of Southam in the same parish; but the bill was dismissed at the rolls, and affirmed upon an appeal. Vern. 575. pl. 520. Hill. 1706. Bruges v. Curwin.

21. Bill for *over stocking a common* was brought by the grantee against the grantor, praying an injunction against over-stocking, but dismissed. 2 Vern. 116. pl. 113. Mich. 1689. Fines v. Cobb.

22. The greatest part of the landholders intitled to a right of common agree to a *stint*, and brought a bill to confirm it; but the bill was dismissed, first at the rolls, and now by lord Cowper. 2 Vern. 575. pl. 520. Hill. 1706. Bruges v. Curwin & al.

23. A bill was brought to *quiet possession* of a right of commonage in a common, part of the manor of Moreton in Surry, and to prevent distresses. An answer and demurrer were put in, and then plaintiffs amend their bill, and obtain an *injunction* till answer and further order. The defendants now moved to dissolve it, and the plaintiffs produced affidavits of above 50 years quiet possession, and evidence of their right in queen Elizabeth's time; yet the court refused to interpose till one or more verdicts at law, and dissolved the injunction that it may be tried immediately. G. Eq. R. 183. Hill. 12 Geo. 1. says it was so ruled by lord king in case of the manor of Moreton in Surry.

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24. Lord of a manor brings a bill against a tenant, to hold a *down* belonging to the manor, discharged of a right of common thereto; this is an improper bill, in regard the plaintiff may, by the same reason, bring a separate bill against every tenant of his manor making the like claim. 3 Wms's Rep. 256, 257. pl. 63. Pasch. 1734. Hq. der v. Chambury.

(A. a) Approvement thereof by Statute.

So if he plows it, yet he that incloses or plows shall have his common with the other, and the other shall have his writ against him to have his common. Fitzh. Droit. pl. 59. cites S. C.

1. **I** F two have enter-commoning of land, &c. and after the one incloses, there the other cannot inclose likewise, unless it be by common assent at first. Br. Common, pl. 47. cites 14 H. 3. and Fitzh. Droit 59.

Hereby it appears that the lord

2. Stat. Merton, 20 H. 3. cap. 4. *Because great men having inclosed others their tenants of small tenements in their great manors, could not approve by the order of the common law, because the common issued out of the whole waste, and of every part thereof; and yet see Tr. 6 H. 3. where the lord approved 2 acres, and left sufficient, the tenant brought an assise, and the special matter being found, the plaintiff retraxit &c. The purview of this statute extends only for the lord to make an approvement against his tenant, and not against any stranger, nor where the lord had common appendant in the tenancy, as he may have; but see the statute of W. 2. 2 Inst. 85.*

Coke Ch. J. said, that the statute of Merton was only an *affirmance* of the common law; for at the common law the lord might approve leaving sufficient for his tenants, and that so are diverse cases in time of H. 3. Fitzh. tit. Approvement; which was before the statute, and this appears by the writ of quod permittat, which is quod tantum habeat paturam, &c. having regard to his franktenement; and the writ of admeasurement is, quod habeat plura animalia quam debeat in respect of his franktenement, to which the lord chancellor agreed. Roll. Rep. 365. pl. 18. Pasch. 14 Jac. in the Star-chamber, in case of Proctor v. Mallorie. — Before the statute the lord could not approve, per Windham J. Sid. 106. pl. 17. Hill. 14 & 15 Car. 2. B. B.

* [4]

When a lord of a manor (wherein was great waste grounds) did inclose others of some parcels of arable land, the feoffees ad mantitend. servitium focæ, should have common in the said waste of the lord for 2 caules; 1st. As incident to the feoffment; for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture, and by consequence the tenant should have common in the waste of the lord for his beasts which do plough and manure his tenancy, as appendant to his tenancy, and this was the beginning of common appendant. The second reason was, for maintenance and advancement of agriculture and tillage, which was much favoured in law. 2 Inst. 85, 86.

The lord may prove against a tenant that

It was provided, that when such feoffers bring an assise for the common of pastures, and alledge that they have not sufficient pastures for their tenements, nor sufficient ingress and regress,

that he hath common of pasture appendant; but if the lord grants common pasture within his waste, there is no approvement by this act against a common in gross; for the words of the statute be, quantum pertinet ad tenementa sua, &c. And so was the law taken and adjudged soon after the making of this act, and latter authorities agree with the same; and albeit the common appendant be without a certain number, as to have sufficient pasture for beasts, quantum pertinet ad tenementa sua, which may be reduced to a certainty, for id certum est quod certum reddi potest, and therefore this act doth extend to it; and the writ of admeasurement of pasture doth lie only for and against such commoners as have common appendant, for the words of the writ be, Et ad ipsos pertinet habendum secundum liberum tenementum suum, &c. so as common appendant be it certain or uncertain is within this statute;

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gate; and so is common appurtenant certain or uncertain, for (pertinet extends as well to common appurtenant as appendant. 2 Inst. 86.

Throughout all this statute, *Pastura & communia pasturæ* is named, so as this statute of approvals doth not extend to common of piscary, of turbary, of estovers, or the like. 2 Inst. 87.

By the approvement of part, according to this statute, that part by this act is discharged, inasmuch as if the tenant, which hath the common, purchases that part, his common is not extinguished in the residue. 2 Inst. 87.

The truth shall be inquired by assise;

And yet it

in an *assise of trespass*; for many times he shall fail to have an assise. Or if the lord doth inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth upon the ground which is his common. 2 Inst. 88.

And if found so by assise, they shall recover seisin by writ of the jurors; so that by their discretion and oath they shall have sufficient, &c. and the disseisors shall be amerced and yield damages as they were wont to do before; but if found, that the plaintiffs have sufficient pasture, ingress and regress, then the other may make his profit of the residue, and go quit of the assise.

A commoner brought an assise of common of pasture belonging to his freehold, the tenant

said he was lord, &c. and approved part of his waste, and left the plaintiff sufficient common, &c. The plaintiff denied that he left sufficient common, and thereupon issue was taken, and Sir William Herle, Ch. Just. of the court of C. B. took the assise, and the assise found, that the plaintiff had not sufficient common; whereupon the court did award that the plaintiff should recover his common, &c. and the recognitors of the assise were going from the bar; and albeit the issue was found against the tenant, yet for his advantage the recognitors of the assise ought to come back again; and to ordain, by their discretion and oath, sufficient common to the plaintiff, so that the defendant might approve of the remainder, by this statute of Merton, as Trewood affirmed; whereupon Sir Wm. Herle perused the statute, and found the statute as Trewood had said, and therefore was in purpose to have caused the jurors to come again (the record yet being in his breast) to appoint sufficient common to the plaintiff, according to the statute; but it was prevented, for that the parties agreed. 2 Inst. 88.

3. *Westm. 2. cap. 46. 13 E. 1. The statute of Merton shall not only bind the lord's tenants, but his neighbours also which claim common of pasture as appurtenant to their tenements; but if any claim common by special feoffment or grant for a certain number of beasts, or otherwise, which is due to him of common right, he shall recover the same according to the form of such grant.*

* Here is the statute of Merton recited; and because in that act no mention was made be-

tween neighbour and neighbour, the doubt was, whether that statute extended only between lord and tenant; and therefore many lords of wastes, woods, and pastures, have been letted to make approvement by the contradiction of neighbours, tho' they had sufficient pasture; for remedy whereof this statute was made. 2 Inst. 474.

† Note, it is said that the lord could not improve against a neighbour, but that the lords were hindered by the contradiction of the neighbours; for by the common law the lord might improve against any that had common appendant, but not against a commoner by grant. 2 Inst. 474. [5]

Vicius is properly *qui una in eodem vico est*, but here it is taken for a neighbour, tho' he dwells in another town, so that the commons and towns be adjoining together; and if the lord hath common in the tenant's ground, the tenant may improve within this act, for there the lord is in this case vicinus. 2 Inst. 474.

4. * *By occasion of a windmill, sheepcote, dairy, enlarging of a court, &c. necessary, or curtilage, none shall be grieved by assise of novel disseisin for common of pasture.*

* Here be 5 kinds of improvements expressed, that both

between lord and tenant, and neighbour and neighbour, may be done without sufficient common to them that have it (any thing either herein, or in the statute of Merton to the contrary, notwithstanding) and these 5 are put but for examples; for the lord may erect a house for the dwelling of a beast-keeper, for the safe custody of the beasts as well of the lord as of the commoners depasturing there in that soil; and yet it is not within the letter of this law. 2 Inst. 476.

† The word (*necessary*) is to be applied to curtilage, both in congruity and by our books, and necessary shall not be taken according to the quantity of the freehold be bath there, but according to his person, estate or degree, and for his necessary dwelling and abode; for if he hath no freehold there in that town but his house only, yet may he make a necessary enlargement of his curtilage. 2 Inst. 476.

5. The lord made a feoffment of parcel of his waste land; the feoffee may inclose; for this is an improvement in the lord by the feoffment; per Ston. and Mutf. but contra per Scrope and Berr. Br. Common, pl. 51. cites 16 E. 2. and Fitzh. Garrantie de Chart. 31.

6. A man has common in three vills, the lord may approve in the one vill, leaving sufficient common in the other two vills. Br. Common, pl. 53. cites 3 E. 3. Itinere Derb.

7. If the lord improve part of the common, he shall not have common for the land improved out of the residue of the common. Godb. 97. cites 5 Ass. 2.

8. Affise of common of pasture; the defendant said, that he had approved of the waste, saving to others sufficient common, and free coming in and going out, &c. The plaintiff said, that he had not sufficient common; Prist &c. and the assise said that he had not sufficient common, by which it was awarded, that he recover his common; and it was held that the jury, by their discretion, shall ordain sufficient common to the plaintiff, so that the tenant may approve of the rest; for so are the words in the statute of Merton; quod nota; by which the parties agreed; quod nota. Br. Assise, pl. 125. cites 7 Ass. 16.

9. Affise of common; the defendant said, that he has approved according to the statute by reason that he is lord, leaving to the tenant sufficient common; there the plaintiff shall recover immediately. But by the opinion of the court the assise shall inquire of the sufficiency of the common, and so they did in Trin. 8. E. 3. and the bar good without colour given, and the assise awarded upon seisin and disseisin also; quod nota. Br. Assise, pl. 423. cites 7 E. 3. 67.

10. Affise of common; J. said that W. is lord, and approved, &c. and left to the plaintiff and other tenants sufficient common, and the assise was charged of the sufficiency of the common, which said that they had not sufficient common; but the plaintiff was disseised, and it was said by some, that if at the time of the approvement sufficient common was saved to the plaintiff, this suffices. Br. Assise, pl. 135. cites 8 Ass. 18.

11. In assise, by some, where sufficient common at the time of the approvement is left to the commoner it suffices, though it be not sufficient after. Br. Common, pl. 21. cites 8 Ass. 18.

12. In assise, lord and tenant were, and the lord had common in the soil of the tenant, which is held of him of his manor of D. of which the land in which the lord claim'd common is held, and yet, per cur. the tenant may approve his own soil; for tho' the statute does not speak, but that the lord may approve against his tenant and against his neighbour, yet the lord in this case is not but as a neighbour to the owner of the soil, and the tenant as owner of the soil may approve, per cur. by which assise was awarded to enquire of the sufficiency of the common; for the owner may well approve. Br. Common, pl. 22. cites 18. Ass. 4.

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13. In assise it was adjudged that the lord may approve in his own soil against his tenants and his neighbours. And where the lord of a manor approves, and the lord of whom the lord of the manor holds the manor has common there by vicinage, yet the approvement is good against him also; for he has no common but as neighbour; quod nota; by which the assise was awarded, to inquire if the plaintiff, who was lord paramount, had sufficient common or not, quod mirum! for by the demurrer that he is lord, it is not denied but that he has sufficient common, and also is party. Br. Assise, pl. 447. (446.) cites 18 E. 3.

14. Assise of common of piscary; per Fencot, if I grant common throughout my manor with all manner of beasts, I cannot approve; but if I save to myself certain parcel of land for my several, I shall have it, and he shall not have common there; quod non negatur. Br. Common, pl. 26. cites 34 Ass. 11.

15. If the lord leaves sufficient common, but the way is not at so good ease or plight as it was before, assise of common lies. F. N. B. 125. (D) in the new notes there (C) cites 11 H. 4. 26. by Stour.

16. In trespasss it was agreed that where a man has common appendant out of certain land, yet the lord may approve the soil, and this it seems by leaving to the tenant sufficient common with egress and regress, according to the statute. Br. Common, pl. 20. cites 15 H. 7. 10. Br. Common, pl. 9, cites S. C. & S. P.

17. Trespass of house broken, the defendant justified because he has common there, and therefore he broke the house; the plaintiff said that he is owner of the soil, and did it to harbour a man to keep the soil; but the statute W. 2. cap. 46, does not speak but of Windmill, sheep-cote, dairy, and augmentation of court; but it seems by Huls, that it may be taken by the equity; quere. Br. Common. pl. 19. cites 7 H. 8. 38.

18. Stat. 3 & 4 E. 6. cap. 3. The statute of Merton, cap. 4. & Westm. 2. cap. 46. are confirmed.

19. Upon judgment for the plaintiff, in an assise upon any branch of the said statutes of Merton, or W. 2. the court shall award treble damages.

20. This act shall not extend to houses heretofore built upon wastes, or commons, not having above 3 acres of such waste or common ground belonging to them; nor to any garden, orchard or pond there, not exceeding 2 acres; neither yet shall it cause any person to lose or forfeit any pain or damage for the same, but such houses and grounds shall still stand and remain; howbeit the owners of such wastes or commons may lay open so much thereof as shall exceed 3 acres.

21. And where one usurpeth common in the time that heirs are within age, or a woman is covert, or whilst the pasture is in the hands of tenants in dower, or of other particular estates; they who have such entry from time in which the writ of Mordancester runneth, if they had no common before, shall have no recovery by writ of Novel Disseisin, if they be desorced.

22. It was moved, whether in case of common appurtenant by prescription without number the lord of the waste might improve? for

it is not admeasurable, therefore not improveable; for the common being without number, the sufficiency cannot be proved. Dyer & Manwood J. held, that altho' it be without number, yet it may be reduced to a certainty being by prescription; as the *number of the cattle which the best and most substantial tenant of the said tenement, at any time within time of memory, had kept upon the said waste*, and then the plaintiff, the lord, might improve leaving sufficient according to such rate. 4 Le. 41. pl. 112. Mich. 19. Eliz. C. B. Anon.

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23. If 2 lords of 2 manors have 2 wastes adjoining, without inclosure or separation, but the bounds of each are well known by certain marks, the one may inclose against the other, tho' the tenants of each manor have reciprocally common'd there by reason of vicinage, 4 Rep. 38. b. Mich. 26 and 27 Eliz. cited by the reporter, as lately adjudg'd in B. R. in case of Smith v. How.

24. The lord may make *fish-ponds* upon the common, and the commoner can't destroy them. Per cur. Ow. 114, 43 Eliz. B. R. in the case of Pelling v. Langden.

Where they have common in gross sans nombre the lord cannot approve against them, per Powel J. Id. Raym. Rep. 407. Mich. 10 W. 3.—It is to be observed, that neither this statute, nor the statute of Merton extends

to any common, but to common appendant or appurtenant to his tenement, and not to a common in gross to a certain number. 2 Inst. 475.

25. Where men have common in gross for a certain number of beasts, the lord may approve leaving sufficient for them [but Roll says, quære this, for the statute W. 2. cap. 50. [46.] seems to be e contra.] Common sans number is usually put in cases, but Coke says, he never knew such common granted, and therefore when it comes in question, he said he will deliver his opinion thereof; but says, that notwithstanding such grant the lord may common with him, and also the grantee ought to use the common with a reasonable number. [Roll remarks here, that F. N. B. is the writ of admeasurement lies not of common sans number] per Coke Ch. J. and the lord chancellor agreed particularly to all said by Coke. Roll Rep. 365. pl. 18. Pasch. 14. Jac. in the Star-chamber, in case Proctor v. Mallorie.

26. A lord that is in by wrong may improve by virtue of the statute of Merton against the tenants and commoners. Clayt. 38, August 11 Car. before Barkley J. Hamerton v. Eastoff.

Sid. 9. pl. 4. S. C.

27. The lord can't erect an house, within the statute of Merton, unless it be for his own habitation or his shepherd's, and he must alledge, that he built it for one of those purposes; for otherwise he may build a great house to let to a nobleman, which may require a greater curtilage than the lord or his herdsman. Lev. 62. Pasch. 14. Car. B. R. Nevil v. Hammerton.

- Lev. 62. S. C. adjudged. Exception was taken, that it was not over'd, that there was sufficient common left, and to

28. One inclosed 2 acres of common (where all the common was but 3 acres) to enlarge the curtilage of his house, and so justified by the statute West. 2. cap. 46. It was argued, that it was not good because he did not allege, that his house was an ancient house, nor that his curtilage was straight, and if it was, yet it would be unreasonable to inclose 2 acres out of 3; but it was answered, that the statute speaks of houses, without saying ancient houses, and therefore, if it were material it should come of the other side. Windham J. held,

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held, that the house ought to be an ancient house; (but Twisden J. this Twisden seem'd e contra,) but it not appearing that it was for his necessary inclin'd, but residence it was adjudged, that he could not inclose. Sid. 79. pl. 4. Windham e Trin. 14. Car. 2. B. R. Nevel v. Hamerton. contra, that this is to be averr'd only

where the inclosure is for improvement of the land, and not where it is for the enlargement of the cartilage.

29. An approvement may be against all commoners, unless sans nombre or in gross; per Keeling; but per Windham one cannot improve against his own grant, tho' it be to a certain number. Keb. 830. in pl. 8. Hill, 16 & 17 Car. 2. B. R. in case of the King v. St. Brivil's inhabitants,

30. Lord of a manor inclosed part of a common, and there being young wood and timber growing thereon, the plaintiff insisted, it was an improvement within the statute of Merton, W. 2. 46. In a like case 2 issues were directed to be tried whether some of the defendants had right of common there. The court thought fit to continue the injunction, and directed a trial to be had at the next assises whether sufficient common was left for the tenants. 2 Vern. 301. pl. 290. Mich. 1693. Weekes v. Staker.

and whether sufficient common was left for the tenants; and an injunction to quiet the possession in the mean time was continued, tho' a new inclosure, and made not above 2 years before the bill exhibited. 2 Vern. 356. pl. 322. Hill. 1697. Arthington v. Fawkes.

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31. Agreement between lord and tenants for inclosing a common, that the tenants should quit their right of common, and the lord should release them all quit-rents; the inclosure was prevented by pulling down the fence, and the tenants continued to use the common and some of them to pay their quit-rents. This is a waiver of the agreement, MS. Tab. January 2, 1719, lady Laneshury v. Ockthoth.

32. Owner of lands bound by agreement of his bailiff for inclosing of a common, having acquiesced 30 years. MS. Tab. March 1720, Tufton v. Wentworth.

33. Bill brought by plaintiffs as tenants of the manor of Walton, in the county of Surry, to establish their right of common of pasture and turbary in the waste of the said manor, and for injunction against defendant Palmer, lessee of the manor for years under the crown, to stay his digging of brick-earth, and making brick, and inclosing part of the common, &c. Motion upon the bill filed, and affidavits of making brick and inclosing part of the common till answer and further order, King C. assisted by J. Jekyle master of the rolls, denied the motion; for that the lord of common right was intitled to the soil of the waste, and the tenants had only a right to take the herbage by the mouth of their cattle; and by statute of Merton, the lord might inclose part of the waste leaving sufficient common; that at common law, in an action brought against the lord, the tenant must alledge in the declaration, that there is not sufficient common left or he can't maintain the action; and if that should be the present case (tho' no such matter is made out by the affidavits) the tenants may have their remedy at common law; that the lord has a right to open mines in the waste of the manor, and why not to dig brick-earth, especially in the present case, where the bricks are made

made for one of the tenants of the manor, and to be employ'd in building upon the manor. As to the inclosure, it was too soon for an injunction before answer. MS. Rep. Pasch. 2 Geo. 2. in Canc. v. Palmer & al.

(B. a) Inquisition, Pleadings and Proceedings in a Noctanter, or Action for throwing down Inclosures.

That is to indict them at the king's suit, either of riot, force, or jury, and the towns adjoining will not indict such as are guilty of or trespass; but seeing no time is appointed, the law doth appoint (as in many cases it doth) a year and a day for the indicting of the misdoers; and by the indictment the lord shall know against whom to bring his action. 2 Inst. 476.

I. 13 Ed. 1. *If any (upon just title of approvement) do make a ditch or hedge for that purpose, which afterwards is thrown down by some who cannot be discovered by verdict of the assise of riot, force, or jury, and the towns adjoining will not indict such as are guilty of the fact, in such case the said towns shall be distrained to level again such ditch or hedge at their own costs, and shall also yield damages.*

law doth appoint (as in many cases it doth) a year and a day for the indicting of the misdoers; and by the indictment the lord shall know against whom to bring his action. 2 Inst. 476.

If the bordering towns do not, within a year and a day, indict the misdoers, then shall the lord, or other party grieved, bring his action upon this branch against the towns bordering round about the town wherein the fact was done, and judgment shall be given, that they shall, at their proper costs, make the ditch or hedge, &c. and yield damages; and after judgment given, they shall be distrained to make the hedge or ditch, &c. and so it was holden in the Star-chamber. Hill. 14. Jac. * in Sir Wm. Mallorie's case. 2 Inst. 476. — Coke Ch. J. said he had seen an ancient reading upon this statute, wherein it was held that the next vill should have a year and a day to indict the offenders, and if the vill does not do it within the said time, then it shall not be indicted upon the statute to repair the inclosure, but the party grieved shall have an action upon this statute, as a man that is robbed shall have an action upon the statute of Winton against the hundred; and said that there is a note in the margin of the reading that in time of E. 4. Pigott J. held accordingly at a reading, and that it seem'd to him to be good law. And the lord chancellor afterwards agreed particularly all that which was said by Coke. Roll Rep. 365. pl. 18. Pasch. 14. Jac. in the Star-chamber, in the case of Proctor v. Mallorie.

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Cro. C. 280. 281. pl. 20. S. C. accordingly. 2. Upon exception taken to the writ, a *new distringas* was awarded against the vills adjacent, and issues were estreated. Jo. 306. pl. 18. Mich. 8 Car. B. R. The case of the forest of Dean, alias, Gibbon's case.

Adjudg'd that a year and a day is not necessary to be allow'd, but a convenient time; and of that the court may properly judge. 3 Salk. 167. Pasch. 1 W. 3. The king v. Penrith inhabitants. — S. P. Skinn. 94. Hill. 35 Car. 2. B. R. per cur. in Creswick's case. — The statute supposes a *reasonable time* ought to be allowed for indicting before the action should be brought on the statute; per curiam. 10 Mod. 157. Pasch. 10 Ann. B. R. the queen v. Gruchthorp inhabitants. — All the precedents are at least a year's time. 10 Mod. 157. S. C.

3. There need not to be a year before the offenders should be indicted, but there ought to be a *convenient time for the country to enquire* who were the profliterers, and the court shall adjudge what time is convenient; per Banks Att. Gen. cites a resolution in 12 Jac. Cro. C. 440. pl. 10. Hill, 11. Car. B. R. in case of the King v. Epworth.

4. Judgment was had against the inhabitants of S. to repair at their own proper costs the fences and dikes thrown down, and because it was not done, a writ of inquiry of damages issued, and 500l. damages found, and a *distringas* to the sheriff, to levy it upon the vills; upon which they came by their counsel, and *prayed to have liberty*

liberty to plead, inasmuch as by this way they are condemned unheard, and that by an inquest against which no attain lies. And it was doubted whether a *scire facias* ought to have issued before the distringas, but upon consideration the court thought, that the *distringas* ought to have contained a *scire facias* in it, and so they obtained leave to plead. Sid. 107. pl. 19. Hill. 14 & 15 Car. 2. B. R. Queen Mother v. Somersham inhabitants.

5. The court was moved for a distringas against the inhabitants of H. for throwing down of banks of the earl of Bedford's in his drain'd land. Per Roll Ch. J. take it, but *at the return of the distringas the inhabitants may plead to you* notwithstanding. Noy, the late king's attorney, would not have suffered it. Sty. 417. Trin. 1654. Anon.

6. After money levied by distringas containing *fieri facias* grounded on W. 2. cap. 46. for throwing down inclosures, and inquisition taken by the sheriff; Jones prayed that the money might be brought into court, and remain, and that he might have time to plead, which the court granted. Keb. 479. pl. 7. Pasch. 15 Car. 2. B. R. The king v. the inhabitants of the Forest of Dean.

7. Upon an inquisition for throwing down fences, and 80 l. damages assessed, a distringas issued, and defendants came in, and plead, that it was *not done noctanter*, which was found against them, and second damages given; and it was moved to set aside the first damages, 1st. Because the inquisition is only to ascertain what villis have done it, to the intent that a distringas may go out, and it was never intended to conclude any in point of damages, being only an inquest of office, against which no attain lies. 2dly, Because those damages are assessed upon us before we were summoned, and so we were not heard for our excuse and to mitigate them, but condemned and concluded not heard, nor not summoned, and they cited Cro. C. 280. and Cro. E. 859. 2 Inst. 477. Cro. Car. 580. And they said, that they might plead to the right upon the distringas, so that it is not reason that they should be concluded as to the damages by the inquisition; but per cur. the first damages should stand, and shall not be vitiated by the second, because the *second verdict as to the damages is void*, inasmuch as the *sole matter to be enquired upon the second issue is the noctanter*, but for better security they directed the prosecutors to release the second damages, and as to the mischief objected, that the damages being assessed by inquest of office no attain lies that is true, but cannot be properly said mischief, because it is so enacted by parliament, that the damages shall be assessed as before; yet if they are excessive, the party is not without remedy; for when they come in to plead to the noctanter, if the damages were outrageous, they ought to have taken in their plea, viz. *protestando*, that the damages were outrageous; and after might have pleaded, 1st. the damages were only of such a value, and upon this other issue should be taken; wherefore the counsel for the defendants in this case moved, that they may now plead to the excessiveness of the damages, but inasmuch as they have not taken it by *protestando* before the first issue found against them, the court would not suffer them, but gave judgment for the plaintiff, and that the 80 l. being levied upon the distringas, they shall have it out

[10]

of the court notwithstanding the second damages given by the second verdict. Sid. 212. pl. 10. Trin. 16 Car. 2. B. R. the king v. Upwood and Ravely Villis in Com. Huntington.

3 Salk. 167.
S. C.

8. *Distringas* upon the statute of *Westm.* 2. for throwing down inclosures against the inhabitants of proximis villis; two of each vill came, and *pleaded* for themselves and the other inhabitants of the several villis, *that the fences were thrown down in the day-time when the persons might be known, absque hoc* that they were thrown down in the night, or at such time that the offenders could not be known, and so *issue join'd in the disjunctive*; and now at the trial at bar 'twas said for the defendants, that if the throwing down was either *in the day, or in the night, so* publickly that the malefactors were known, 'tis not within the statute*, to which the court agreed; for the statute was to give remedy in cases where the malefactors not being known, the parties were without remedy by trespass, &c. But if it was done *in the day or night before the face of the owners*, so that they have remedy by trespass, &c. this is not within the statute; and upon the evidence it appearing to be done publickly, and yet by the defendants, the jury, by direction of the court, found for the defendants. Lev. 108. Trin. 15 Car. 2. the king v. inhabitants of Woodford, Chingford and other villis in Essex.

2 Lutw. 157.
Malabar's case.

2 Keb. 663.
pl. 21. The king v. the inhabitants of East Grinstead, the court proctor Keeling Ch. J. inclined

9. An *inquisition* was returned upon the statute against pulling down inclosures. They *took issue as to the damages only*. It was moved that before the trial for the damages, there might be judgment given to have them set up again, having been long down; Twisden said, when you have judgment for the damages, then *one distringas will serve for setting up the inclosures and the damages too*. Mod. 66. pl. 12. Mich. 22 Car. 2. B. R. Anon.

to grant a new *distringas*, as to the rebuilding the fences, being confess'd to be down by the other issue; but time was given to plead *de novo*.—Ibid. 683. pl. 2. the court ordered the issue as to the damages to be tried first, and then a writ may be granted for setting up the fences, and for the damages also.—Ibid. 723. pl. 127. S. C. The trial at bar being over as to the damages, the court granted a *distringas* to levy and set up the fences, but would not order it by any day certain, but to follow the process of the court, and so for the issues.

But this must be taken by protestation before the first issue found against them.

The statute provides no remedy for cutting down trees. Skinn. 94. Hill. 35 Car.

9. B. R. in Crefwick's case.——2 Show. 255. pl. 263. The king and Chifwick v. Bitton inhabitants. S. C. & S. P. by Jones J.

* [11]

10. If the *damages are excessive*, when the parties come in to plead the *noctanter*, they may take, by *protestation*, that the damages were excessive, and after *plead* that the damages were not but of such a value. Per Cur. Lutw. 157. Pasch. 32 Car. 2. Malabar's case.

* 11. The *cutting down timber trees* by persons unknown *noctanter, is not within the statute* W. 2. Cap. 46; for the words of the statute are *foffatum & sepem prostraverunt*. Resolved by Saunders, Ch. J. Raym. 487. Hill. 34 & 35 Car. 2. B. R. The king v. Bitton inhabitants.

12. Upon the return of an *inquisition a distringas was awarded*, whereupon it was objected that instead thereof a *scire facias* should have issued, to shew cause, &c. but adjudged that a *sci. fa.* was not necessary. 3 Salk. 167. Pasch. 1 W. 3. B. R. The King v. Penrith inhabitants.

13. *Dif-*

Common.

11

13. *Distingas* for throwing down fences, &c. was *quashed*, because there were not 15 days between the *teste* and return. Show. 80. Mich. 1 W. & M. Symson v. Penrith.

3 Salk. 167. The king v. Penrith inhabitants S. C. and the court held it ill.

15. An *information* for a riot lies in the crown-office for breaking fences and inclosures in Hertfordshire. Show. 106. Mich. 1 W. & M. the King v. Berchet & al'.

16. Upon the return of an *inquisition* for flinging down the fences of S. &c. it was objected that it did not appear that S. was lord of the manor, or had a right to these fences; but it was held that this need not be shewn; for if he had no right, this ought to be shewn on the other side. 3 Salk. 167. Pasch. 1. W. 3. B. R. The king v. Penrith inhabitants.

17. In writ of inquiry of damages for fences thrown down in the night, it was held per cur. that there was no need of notice of the execution of the writ, because traverseable; but per cur. it was qualified, because it was *interessatus fuit pro residuo cuiusdam termini*, where it ought to have been *possessionatus, fuit*; it might have been a concurrent lease, or lease not commenced, and no possession laid, and therefore it was ill. Show. 106. Mich. 1 W. & M. The King v. Hermitage (inhabitants).

18. Of this waste, or might be only a commoner, and so have no right to inclose, and so not within the statute; but the court resolved, that *in vi termini*, the words import that he had an interest in the land of this waste, and not in the herbage only. And Holt, Ch. J. held that he who had only the herbage might inclose, and therefore the return in the *inquisition* was held good, for it is not necessary to set forth what estate the party had.—In debate of this case it was agreed per cur. that a grantee of a common might have this writ, and that so might the owner of the waste, or grantee of the herbage. Show. 106.

He that has reasonable herbage cannot inclose, but he that has herbage may. Arg. Godb. 417. Trin. 22 Jac. B. R. in case of Lord Zouch v. Moore.

19. In a noctanter it is not necessary to set forth what estate a man hath; per Holt. Ch. J. Carth. 214. Pasch. 2 W. & M. in B. R. The King v. the inhabitants of the Hermitage.

20. And says that in those cases the estate of the party is not set forth.—Show. 106. S. C. says that in debate of this case it was agreed per cur. that grantee of a common might have this writ, and so might owner of the waste, and also grantee of the herbage.

19. The *inquisition* found 100 perches, and 2 gates, and 20 stiles pulled down; but it appeared upon the evidence that no more than 3 perches of hedge and fence, and 9 gates, and 3 stiles were pulled down, &c. But per cur. this matter cannot be inquired into, because the defendant had not traversed the number, and so that was not an issue; quod nota; for it was an oversight of the pleader. Carth. 242. Pasch. 2 W. & M. in B. R. The King v. inhabitants of Hermitage.

20. A. licences B. to make and continue an inclosure of common to him and his heirs; C. the heir of A. breaks down the fences, and justifies for right of common; B. pleads as above; per cur. [12] 'tis ill by way of licence, but 'tis good by way of release of common, but a licence is determined by his death. Show. 349. Pasch. 4 W. & M. Miles v. Etteridge.

21. In trespass for *pulling up* and throwing down a hedge, the court would give *no more costs than damages*; there being no asportation. Comb. 420. Hill. 9 W. 3. Br. Anon.

They may appear and traverse, tho' they have no day curiam. In case of *More v. Watts*.
22. The neighbouring vills upon the distringas may come and *traverse the facts* being done *noctanter*, or that they were the *next vills*, or even the *damage*. 12 Mod. 340. Mich. 12 W. 3. per Holt.

1 Salk. 583. pl. 3. per Holt, Ch. J. in S. C.

23. This statute not extending to every lord, but to such only as had right to approve; the defendants, to shew that the lord had *no right to approve*, pleaded a prescription to common thus; viz. *that divers freeholders had a right to common, without confining their prescription to any certain particular tenements*. It was admitted that by way of *custom* this general way of pleading had been good; but not by way of prescription, and to this opinion the court inclined. 10 Mod. 157, 158. Pasch. 12 Ann. B. R. the Queen v. Græthorpe inhabitants.

24. As to the *form of proceeding against proflerners* of fences of lands approv'd out of the common, and several pleas of the defendants, see Cro. C. 280, 439, 580. and Lutw. 157, 158. and *ibid.* 169 to 180.

(C. a) Apportion'd. In what Cases.

Common appendant may be apportion'd, because it is of common right, and therefore, if *commoner purchases parcel of the land in which*, yet the common shall be apportion'd. 4 Rep. 37. 6. Mich. 26 & 27 Eliz. B. R. resolv'd in Turringham's case.

2. In case of common for a *certain number of cattle*, if *so small a parcel be demised which will not keep one ox nor a sheep*, then the whole common shall remain with the lessor *always*, as that the land in which be *not surcharged*. 13 Rep. 66. Hill. 7. Jac. C. B. Morfe v. Webb.

Rep. 65. 5. C. 3. Common appendant and appurtenant is all one as to severance; for if such commoner grants parcel of the land to which the common is appurtenant, or appendant, the grantee shall have common *pro rata*; agreed. 2 Brownl. 297. Hill, 7 Jac. C. B. Morfe v. Webb.

4. Common, *sans nombre in gross*, cannot be apportion'd by purchase of part of the land; per Powell J. Ld. Raym. Rep. 407; Mich. 10. W. 3.

[13] (D. a) Admeasurement and Surcharge of Common. In what Cases the Writs lie.

Though the statute I. 13 E. 1. Westm. UPON a second surcharge of pasture, if the pasture were admeasured before the justices, 2. cap. 8. the remedy shall be by writ judicial returnable before the justices under 13 E. 1. cap. 2.

the seal of the sheriff and jurors; and then the justices shall award damages to the plaintiff, and shall estreat into the exchequer the value of the beasts (wherewith the pasture was so overcharged) to be answer'd to the king.

S. 2. If the admeasurement were made in the country, the sheriff, by a chancery writ shall inquire of the surcharge and value of the beasts, and shall answer the same to the king in the exchequer.

S. 3. To prevent fraud in the sheriff, all such writs de secunda superoneratione shall be enrolled, and also at the year's end transcribed in the exchequer; and so likewise shall writs of redisseisin.

H. 3. in the archives of the Tower of London, where a writ de secunda superoneratione was granted. 2 Inst. 370.

When the plea is removed before the justices there upon pleading, or confession before them after admeasurement made and returned, judgment shall be given by the justices; but if the plea be not removed, the admeasurement shall be enquired of, and made before the sheriffs. 2 Inst. 370.

By the writ of secunda superoneratione the plaintiff shall recover his damages against him that was defendant in the first writ, and also he shall forfeit unto the king the cattle which he put in over the due number after the admeasurement made. And all this is by the statute of Westminster. F. N. B. 126. (H).

2. Note, The lord may have an admeasurement; but he himself shall not admeasure. F. N. B. 125. (D) in the new notes there (b) cites Temp. E. 1. Admeasurement 12. See 6 Co. 54. Corbett's Case.

ment of pasture, he that brings the writ ought to be admeasured as well as he against whom the writ is brought, unless where the chief [the lord] himself brings it, &c. And 6 Rep. 54. Corbett's case, is a wrong quotation.

3. If the defendant has common appendant to his freehold in three villis, it may be admeasured for the lands in one of the villis. F. N. B. 125. (D) in the new notes there (c) cites Fitzh. admeasurement 15. in time of E. 1.

4. If one has common appendant, and the lord of the soil grants him common there for 200 beasts more, whereby the common is surcharged, admeasurement lies against him, and he shall admeasure within the number granted him, and shall be put to vouch his grantor to warranty. F. N. B. 125. (D) in the new notes there (c) cites Temp. E. 1. ibid. 16. & Brief 862. * See 22. Assise 65. Admeasurement 11.

5. The writ of admeasurement lies, tho' the plaintiff has disseised the tenant of the common, if he continues seised of the land to which F. N. B. 125. (D) in the new notes there (c) cites 8 E. 3. Admeasurement 14.

6. Note, by all the justices, that writ of admeasurement of pasture does not lie against him who has common appendant, nor against him who has common by specialty for beasts without number, but against him who has common appurtenant, and upon specialty to a certain number of beasts; but then the other ought to plead it, and shew that he has it by specialty for so many beasts, and has put beyond the number of so many beasts. Br. admeasurement, pl. 5. cites 22. Assise 65.

misprinted, and that it should be (65) as in Br.]

12. says, that in case of a surcharge after an admeasurement of pasture, no remedy had been yet provided; yet lord Coke says, he had seen a record in 11

Fitzh. Admeasurement, pl. 12. is, that in writ of admeasurement

Fitzh. Admeasurement, pl. 18. cites 8 E. 3. S. P.

Fitzh. Admeasurement, pl. 6. cites S.C.—F. N. B. 125. (C) in the new notes there (a) cites 22. Assise 55. S. P. [but seems

The writ shall be brought against him only who surcharges; and in this writ all shall be admeasured, but not to their prejudice, seeing they are not parties to the suit.

7. Admeasurement of pasture against one who said, that there is another who has 20 acres of land, to which he has common there, and demanded judgment of writ, because he is not named; for all the tenants shall be admeasured where action is brought by one, and yet non allocatur; for none shall be impleaded, but he who did the tort, and the admeasurement of all is not material, for they should be justly admeasured, and then they have no wrong; but monstraverunt shall be brought by all the tenants, and by Babb. Ch. J. the view well lies in writ of admeasurement. Br. admeasurement, pl. 3. cites 8 H. 6. 26.

F. N. B. 125. (B) in the new notes there (b) cites 8 H. 6. 26.

8. In action brought against one all the tenants shall be admeasured: Br. joinder in action, pl. 32. cites 8 H. 6. 26. per Elerker.

9. If the sheriff returns nihil in writ of admeasurement of pasture, yet the plaintiff shall have judgment as if the process had been returned served, quod non negatur. Br. admeasurement, pl. 7, cites 11 H. 6. 3.

The writ is vicontiel and directed to the sheriff. F. N. B. 126. (F)—2 Inst.

10. Admeasurement of pasture is vicontiel, and the suitors are judges, and not the sheriff; for he has no other court in which he may hold plea but the county, and if he does otherwise it is coram non judice. Br. admeasurement, pl. 6. cites 7. E. 4. 22.

It may be removed out of the county-court by po. at the suit of the plaintiff, without shewing cause in the writ; but at the suit of the defendant he ought to shew cause. 2 Inst. 369. cites 44. E. 3. 10.

If a man be once admeasured by a writ of admeasurement directed unto the sheriff by the sheriff &c. and afterwards he surcharges the common again; then the party who sued the first writ shall have a writ to the sheriff, called a writ de secunda superoneratione. F. N. B. 126. (E) Upon the writ of admeasurement awarded to the sheriff, by which he makes admeasurement, if the defendant surcharge the common after, the writ of secunda superoneratione shall be awarded out of the chancery; but upon a judgment given in the common pleas of admeasurement, &c. if the defendant surcharged the common, the writ of secunda superoneratione shall be awarded out of C. B. F. N. B. 126. (F.)

12. Writ of secunda superoneratione pasture does not lie but where the admeasurement was made before the justices; but not where it is made before the sheriff and suitors; but where the admeasurement is removed after by writ of false judgment, and after the judgment in pais is affirmed in bank, there writ of secunda superoneratione pasture may issue upon it, for now the first admeasurement is of record. Ibid.

13. The writ of admeasurement of pasture lieth betwixt commoners who have common appendant to their freeholds, if one of them surcharge the common, by putting in more cattle in the common than he ought to have common for there, then that commoner shall have this writ of admeasurement of pasture. F. N. B. 125. (B).

14. If the *tenant surcharges* the common with his cattle, &c. the *lord shall not have the writ of admeasurement* against the tenant; but it seemeth the lord may *distrain surplussage* of the cattle damage-tenant. F. N. B. 125. (D).

He cannot distrain the surplus where the tenant has common ap-

pendant till it be admeasured. F. N. B. 125. (D) in the new notes there (b) cites 10. E. 3. 51. 18. E. 3. Admeasurement, 7. per cur. and yet he may approve it.

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15. The lord may have an *assise* against the tenant for the *sur-charge*, for that he is disturbed of the profit of his land. *Quære* of these cases. F. N. B. 125. (D). But if the *lord surcharges* the common, the tenant shall not have a writ of admeasurement against the lord, but he shall have an *assise* of common against the lord. F. N. B. 125. (D).

See Bracton, 229. that the lord may have admeasurement against his tenant, or e converso for a com-

moner against the lord. Temp. E. 1. Admeasurement 16. Not against the lord, because he cannot approve but against the tenant, who is not lord. Ibid. 21. 18 E. 80. Admeasurement 7. If there are two neighbours in a vill, who intercommon each in the other's land, admeasurement does not lie between them; but if there are three neighbours, A, B, and C, and each intercommons in the other's land, if one of them surcharge, the whole admeasurement lies, for he had common in the lands of the three, &c. But where there are only two neighbours, A, and B, admeasurement does not lie; for there, on a surcharge, the remedy is by *assise* as tertenant, and not as a commoner; and a tertenant cannot be admeasured; but where there are three commoners or more who intercommon, each shall be admeasured in the lands of the other. 18 E. 3. 43. Admeasurement 30. F. N. B. 125. (D) in the new notes there (c.) — And it appeareth by the Book of Entries, fol. 123. that a writ of admeasurement does not lie against the lord of the soil. F. N. B. 126. (D) Mich. 9 H. 6. 41. b. pl. 16. S. P. that admeasurement lies not against the lord. — If the lord makes *approvement* of the common unto himself, and leaves not sufficient common to the tenant, the tenant shall have an *assise*, and not a writ of admeasurement. F. N. B. 125. (D).

16. In the time of E. 1. it was agreed, that *one neighbour shall have a writ of admeasurement against another*, where they intercommon by reason of neighbourhood. F. N. B. 125. (E).

17. He who hath *common appurtenant certain*, or common by *grant certain*, shall be admeasured; and a tenant shall have an admeasurement against him; but he who hath a *common appurtenant without number*, or common in *grofs* without number, shall not be stinted, nor a writ of admeasurement doth not lie against him. F. N. B. 125. (D).

18. By the writ of admeasurement *all the commoners shall be admeasured as well as those who were parties to the writ*. F. N. B. 126, 127. (I).

S. P. As well those who have not surcharged the

common, as he who hath surcharged it, and he who bringeth the action shall also be admeasured. F. N. B. 125. (B).

19. But yet if any of those who are commoners, which were not parties to the writs of admeasurement, &c. do surcharge the common after admeasurement, they shall not forfeit their cattle, nor the value of them that were in the pasture above the due number, because they were not parties to the first writ, nor the party shall not recover damages against them for this surcharge in this writ; for the writ of *secunda superoneratione* lies not but only against him against whom the first writ was sued forth. F. N. B. 126, 127. (I).

But note, the judgment on the admeasurement is only to extend between the parties; for if any other be aggrieved, he ought to

bring a new admeasurement. F. N. B. 126, 127, (I) in the new notes there (a) cites 18 E. 3. [30] Admeasurement 7. — 2 Inst. 370. S. P. accordingly.

(E. a) Extinguishment thereof.

1. *ASSISE of common of pasture*, the tenant pleaded that in the time of E. 2. the one land and the other were in the seisin of W. and so by unity the common is extinct; the other said that the land to which he claimed to be appendant is ancient land to which common has been appendant time out of mind, and therefore the assise was awarded. Br. Extinguishment, pl. 27. cites 13 Aff. 21. & concordat. * 15 Aff. 2. It. Northt. But Brook says it seems that 'tis against law, and that the unity is extinguishment for ever.
2. In replevin, the defendant avowed for damage feasant, the plaintiff claimed common appendant, and the defendant alledged unity of possession in the one land and the other since time of memory; this is a good extinguishment of the common; per cur. Br. Extinguishment, pl. 19. cites 24 E. 3. 25, 45.
3. Common is obtained by long sufferance, and may be lost by long negligence. 3 Le. 202. cites Britton. 144. & Bracton. 222, 223.
4. A. has common appendant to his tenement in a great waste, the lord improves part of the waste, leaving sufficient common and way to it in the waste, and afterwards he incloses the commoner of the improvement. This is no extinguishment of the common in the residue of the waste. * D. 339. pl. 45. Mich. 16 & 17 Eliz. Anon. Ibid. Marg. cites 40 Eliz. that 'twas said the reason was because the land improved was utterly discharged of common. * S. C. cited Cro. E. 594, in case of Rotheram v. Green.—S. C. cited Arg. Goldb. 117.
5. Such common as is *admeasurable* shall remain after severance of part of the land to which, &c. Per cur. 4 Rep. 38. a. Mich. 26 & 27 Eliz. Br. in Tirringham's case.
6. Common *appurtenant* cannot be extinct for part, and in esse for part, by act of the parties; agreed. 4 Rep. 38. a. Mich. 26 & 27 Eliz. B. R. in Tirringham's case.
7. Unity of possession of the intire land in which, &c. or to which, &c. extinguishes common appendant, contrary to the opinions 11 E. 3. tit. Common. 11. 14 Aff. 21. 15 Aff. 2. 20 E. 3. Admeasurement
8. The reason of which opinions was for advancement of tillage, and the land to which, &c. was antient land, hide and gayne; but it being against a rule in law, viz. that when a man has as high and perdurable estate in rent, common, &c. issuing out of the same land, there it is extinct, and with this accords 24 E. 3. 25. 4 Rep. 38. a. Mich. 26 & 27 Eliz. B. R. resolv'd in Tirringham's case.
9. In trespass, &c. the case was, that the abbot of D. was seized of a common out of the lands of the abbey of S, as appendant to certain lands of the abbey of D. Afterwards both those abbeyes were dissolved, and the possessions of both given to the king to hold in tam amplo modo, as the lands of late abbots, &c. who granted the lands of one abbey to A. and of the other abbey to B; adjudg'd that the words in tam amplo modo, &c. are to be construed according to law, and no further, and by the law, the said common cannot stand against the unity of possession. 3 Le. 128. pl. 179. Pasch. 27 Eliz. C. B. Nelson's case.
9. J. S.

• Br. Extinguishment, pl. 40. cites S. C. accordingly. But Brook says quere; for 'tis not law.

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Br. Common, pl. 10. cites S. C.

Goldb. 3. pl. 6. S. C. held accordingly.

9. J. S. was seised of 140 acres, and had common appurtenant *Le. 44. pl. 46 acres, 2 in the occupation of A. and the other 44 of B;* and he purchased the 2 acres in the occupation of A. yet the common concerning that is intire and extinct by the purchase. Goldsb. 53. pl. 4. Trin. 29. Eliz. Kimpton's case.

adjudg'd, that by the purchase of part the whole common was extinct. — D. 339. Marg. pl. 45. cites 29 Eliz. S. C. adjudg'd. — S. C. cited Cro. E. 594. pl. 35. by Anderson Ch. J. by the name of Rampton's case adjudg'd. — The difference is between common appendant and appurtenant; for in the last case, by purchase of parcel of the land in which, &c. all the common is extinct. 3 Rep. 79. a. Trin. 7 Jac. resolv'd in Wiat Wild's case.

If a commoner purchases parcel of the land in which he has common appurtenant, this extinguishes all the common; Agreed. 2 Brownl. 297. Hill. 7. Jac. C. B. Morfe v. Webb. — Brownl. 180. S. C. & S. P. accordingly, but otherwise it is of common appendant.

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11. Prescription for common * appendant. *Unity* extinguishes this, but not common for arable land. Mo. 462. pl. 651. Hill. 39 Eliz. Bradshaw's case.

unity as common appurtenant is. Mo. 463. pl. 654. Hill. 39 Eliz. C. B. Smith v. Bowfall.

* Quære if it is not false printed for (appurtenant) especially as common appendant is properly for arable land.

12. Common appurtenant to house and land is extinguished by purchase of the land. Cro. E. 570. pl. 6. Trin. 39 Eliz. B. R. per 2 J. Bradshaw v. Eyre.

13. A man who has common for his cattle levant to his tene- ment in such a field, *releaseth all his right and his common in part of the land;* Anderson, Beaumont, and Owen, J. contra Walsmley held that the whole common is extinct, and cited Rampton's case adjudged that when one purchaseth 1 acre of the field wherein he hath common, it is extinct. Cro. E. 593, pl. 35. Mich. 39 & 40 Eliz. B. R. Rotheram v. Green.

that all the common was extinct.

14. A copyholder had common of estovers in the lord's woods appurtenant to his copyhold; and he purchased the freehold inheritance in the copyhold, and had words in his deeds of purchase, of all commons, &c. appertaining to the said messuage; yet it was adjudged, that the common, which he had, belonged to the copyhold estate, and was extinct; but if there had been special words to make a new grant of the like common as he had in the copyhold before the surrender, it seems it had been good. Mo. 667. pl. 915. Mich. 40 & 41 Eliz. Fort v. Ward.

15. A copyholder had used to take *estovers to repair his hedges;* and the lord granted unto him the freehold of the copyhold by the words of (grant unto him all the lands, tenements, and hereditaments thereto appertaining, and therewith used and occupied) yet it was resolved he should not have common in the land of the lord. Cro. J. 253. pl. 8. cites 42 & 43 Eliz. B. R. Forth v. Ward.

commons &c. appertaining to the said messuage) but adjudg'd, that the common belong'd to the customary estate which is determined, and so it did not pass; but if he had special words to make a new grant of such common as he had appurtenant to the copyhold before the surrender, it seems it had been good. — S. C. cited Gilb. Treat. of Ten. 210, 211. and observes the difference between the words of Grant in Cro. J. and those in Mo. and that in Mo. another reason is added, viz. that now he claims by the lord who cannot have common in his own ground; but this is a reason only where the

common is in the lord's soil; but the other holds where it is in another's soil, which is a much stronger case; for, as it seems, in such case there is no way to continue the common; for by the grant of the freehold it is gone, and the lord can make no new grant of it, but in his soil he may.

A copyholder of inheritance, to which common belong'd by custom, purchased the freehold by these words (*grant, bargain, and sell the said mesuage, with all the commons thereunto belonging.*) It was agreed, that it could not pass by way of bargain and sale. Holt Ch. J. said, that the word (*grant*) being in the deed, if it had been pleaded by the way of grant, it had been good. But this being in trespass, wherein the defendant justified for his common, it was adjudged for the plaintiff, Nisi, &c. Comb. 127. Trin. 1 W. & M. in B. R. Speaker v. Styant.

16. In case of a common appendant, if one tenant of the manor purchases the seignior, and then grants over the tenancy, the common which he had before shall be still appendant; for 'tis not extinguished by the unity, but shall pass with the tenancy, but otherwise of a common in gross. Per Popham. Ow. 122. Mich. 3. Jac. B. R. in case of Jourdan v. Atwood.

[18] 17. If the lord sells his waste, and the copyholder dies, and the lord grants a new copy, he shall have his common. Arg. Brownl. 231. Swain v. Becket.

18. A release of common in one acre is a release of all. Brownl. 180. Morfe v. Webb.

Brownl. 180. Wood v. Moreton, S. C.—Noy. 30 Cole v. Foxtan, S. P. and the court held it no extinguishment, but apportionable, and no prejudice to the tertenant; and Hobart Ch. J. said, that otherwise a grand inconvenience and mischief would ensue; for by that all the commons in England should be extinct, & salus populi est suprema lex. Et apices juris non sunt jura.—Brownl. 17 Hill. 14. Jac. Coles v. Flaxman, S. C.—4 Rep. 37. b. S. P. per cur. accordingly in Tittingham's case.

Yelv. 189, 190. S. C. the words (*cum pertinentiis*) will not create a common; for the common before used was gain'd by custom, and annex'd to the customary estate, and is lost with it, the common not being in its own nature incident to the copyhold estate, but a collateral interest gain'd by usage; quod nota; per tot. cur.—Brownl. 220. S. C. adjudg'd.—2 Brownl. 209. S. C. argued and adjudged.—Bulst. 2. S. C. adjudged, per tot. cur. accordingly; and Fleming Ch. J. said, that the sole point in this case rests upon the prescription; for in this case he ought to say in pleading, *Talis est consuetudo, but after the purchase he cannot say so*; for the purchase extinguishes the prescription, and the common being by prescription which is gone, the custom is gone also; to which Yelverton J. agreed; and Williams J. said, that a copyholder may intitle himself by pleading a usitatum suit, but when himself, by his own act, has determined his estate, he has hereby lost his common; to which Yelverton and Crooke J. agreed.—S. C. cited, 6. Mod. 20. & 1 Balk. 366.—Noy. 136. Darlon v. Hunter S. C. adjudged.—S. C. cited Gilb. Treat of Ten. 210 accordingly; for the common was not appurtenant to the freehold estate granted by the lord, and therefore care ought to be taken to add words to continue the common and other profits appendant to the copyholder after the enfranchisement.

20. A copyholder for life had common in the lord's waste (as all the copyholders had by custom of that manor). The lord grants and confirms the said copyhold lands cum pertinentiis to him and his heirs. Resolved by all the court that the purchaser should not have common there, as the copyholder had; for he had his common by reason of custom, which annexed the same to his customary estate; which being destroy'd by his own act, by making it a freehold, the common is determined, and cannot continue, without special words; and the general words (*cum pertinentiis*) are not sufficient to pass the common. Cro. J. 253. pl. 8. Mich. 8 Jac. B. R. Martham v. Hunter.

21. *Inclſure of part* is an extinguishment of common for cauſe of ſo an inclſure of part vicinage. Brownl. 174. Trin, 12 Jac, Bacon v. Palmer. is an extin-
guishment of his common in the waſte, in which he ought to have common. Noy. 196. Mich. 44 & 45 Eliz. C. B. Bradshaw v. Bockingham.

23. Copyholder has common *in alieno ſola*, the lord *enſeoffſ*; the copyholder the common is extinguished; but if he has common *in the lord's waſte*, and the lord enſeoffſ him of the copyhold *with all commons*, 'tis no extinguishment of the common. Brownl. 173. Trin. 19 Jac, Lee v. Edwards, Hob. 190. pl. 235-
Trin. 15 Jac. Leets v. Edwards S. C. but no opinion—
S. P. For in the firſt caſe it properly and ſtrictly belongs to the lord, but in the laſt caſe it belongs to the ſcote. 1. Salk. 366, per Holt. Ch. J. in caſe of Crowther v. Oldfield.

24. S. ſeiſed of the manor of W. claimed common of paſture belonging thereto in all the open places of the Foreſt of Windſor within the bayliwick of F. and made a title by a grant of R. 1. to the Abbot of Waltham Holy Croſs in Eſſex, and ſhewed the *diſſolution of the abbey*, and the *poſſeſſions coming to the crown*, and a grant of the ſaid manor to one N. with words of *tot, tanta, talia, libertates, privilegia & franchises* &c. quot &c. aliquis abbas &c. and ſo by meſne conveyances brought the title down to himſelf, and pleaded the ſtatute for reviving the liberties in the crown. It was held by Noy that, admitting a good title in the abbot, yet by the diſſolution there was an *unity of poſſeſſion in the crown* which *deſtroy'd the common*, and it ſhall not be revived by the general words of tot, tanta, talia, &c. libertates, &c. becauſe it is neither franchise, liberty, or privilege; and ſo it had been adjudged for land in Brayden Foreſt, formerly the poſſeſſions of the abbot of Malmſbury. But if the king had granted, by *ſpecial words, tot, tanta, & talia, &c. communias, &c. quot, &c.* in ſuch caſe, if there was any common *appendant or appurtenant* to that manor or lands in the abbot's hands, it ſhould be revived; but not ſo of a common *in groſs*, for then every one that hath any part of the abbot's poſſeſſions, ſhould have as great a common by ſuch words as the abbot himſelf had, and ſo the king's lands would be infinitely ſurcharged, but in caſe of common *appendant or appurtenant*, there is no ſuch prejudice, for then no man can common with more cattle than is proportionable to his land, and ſo it was adjudged, Jo, 285, 8 Car. Sir Edmund Sawyer's caſe. [19]

25. By Glin, Ch. J. if copyholders have common *in the ſoil of a ſtranger*, it remains notwithstanding the *infranchiſement of the land*, and ſhall be enjoy'd by all tenants of the land as it was before by copyholders. 2 Sid. 84. Trin. 1658.

26. The lord of the manor *infranchiſes a copyhold with all commons thereto belonging* or appertaining, and afterwards buys in all the other copyholds, and then diſputes the right of common with the copyholders he had *infranchiſed*, and at law recovers againſt the plaintiff, becauſe the preſcription of common to the copyhold was *deſtroy'd* by the *infranchiſement*; and the grant of the copyhold with all common thereunto belonging and appertaining gives no right of common, becauſe when *infranchiſed*, no common in point of law belonged

belonged or appertain'd thereunto. Per cur. decreed the plaintiff should hold and enjoy against the defendant *the same right of common as belonged to the copyhold*, and costs against the defendant. 2 Vern. 250. pl. 236. Hill. 1691. *Styant v. Staker*.

27. In a noſtanter the defendants pleaded, that the manor of F. is parcel of the demefnes of the dutchy of Cornwall, and that the king, &c. was ſeiſed of the manor in fee, as parcel of the ſaid dutchy, and that H. common in which, &c. was parcel of the ſaid manor, and that all the tenants of any tenements held of the ſaid manor lying in the vill of H. have, time out of mind, had common of paſture for all the cattle levant and couchant, &c. at all times of the year, in *Hermitage common*, and that the proſecutor de ſon tort had enclorſed it, ſo as they could not enter &c. and had not left them ſufficient common, and iſſue was taken upon this preſcription modo & forma &c. and upon evidence at the bar it appeared, firſt, that all the tenements in Hermitage, unto which the common of paſture was claimed, were heretofore *parcel of the abbey of Sarum*, and that *by the diſſolution* of that abbey the ſame came to H. 8. before the birth of Ed. 6. *So that the dutchy of Cornwall was likewise, at the ſame time, in the poſſeſſion of H. 8. for want of a duke of Cornwall, and hereby an unity of poſſeſſion* both of the tenements to which the common of paſture appertained, and alſo of Hermitage common,

[20] (the place where the common of paſture was to be had) was at that time in poſſeſſion of king H. 8. and it likewise appeared, that *the tenements in Hermitage were granted to the ſeveral tenants after the unity of poſſeſſion*, and thereupon the counſel of the proſecutor inſiſted, that by this unity the preſcription was deſtroyed, and the common of paſture quite extinct. But after much debate it was unanimouſly reſolved, per Holt Ch. J. and the whole court, that this was not ſuch an unity of poſſeſſion as would deſtroy the preſcription; for though king H. 8. had an eſtate in fee in the lands *a qua*, and alſo in the lands *in qua*, yet he had not as perdurable an eſtate in one as he had in the other; for the quality of the eſtates differed, becauſe in the manor of Fordington, which was parcel of the dutchy of Cornwall, and in *Hermitage common in qua*, &c. which was parcel of that manor, king H. 8. *had only a fee determinable on the birth of a duke of Cornwall*, which is a baſe fee; but in the tenements in Hermitage *parcel of the abbey a qua*, he had a pure fee ſimple indeterminable *jure coronæ*, and therefore an unity of ſuch eſtates works no extinguiſhment; for *where an unity of poſſeſſion doth extinguiſh a preſcriptive right, 'tis requiſite that the party ſhould have an eſtate in the lands a qua, and in the lands in qua, equal in duration, quality, and all other circumſtances of right*. Carth. 240, 241. Paſch. 4. W. and M. B. R. *The King v. Hermitage inhabitants & al'*.

28. *Releaſe of common in 1 acre* is an extinguiſhment of the whole common. Per cur. Show. 250. Paſch. 4 W. & M. in caſe of *Miles v. Etteridge*.

29. Common *ſans nombre in groſs* cannot be extinguiſhed by purchaſe of parcel of the land; per Powell J. lord Raym. Rep. 407. Mich. 10 W. 3.

30. Where

30. Where a copyholder claims common in the waste of the manor, it properly and strictly belongs to his estate, and if he infranchises his copyhold his common is lost; but where he claims it out of the manor, it belongs to the land, and not to the estate; and if he infranchises the estate, yet the common continues; this diversity was taken by Holt, Ch. J. 1 Salk. 366. pl. 5. Hill. 4 Ann. in case of *Crouther v. Oldfield*.

* As if copyholder of one manor has common in waste of another manor, he must prescribe in the name of his lord, and

say, that the lord of the manor, whereof he is copyholder, used time out of mind to have common for him and his copyholders, and there infranchisement of copyhold does not extinguish the common, but is a derivative right which the copyholder has; and so, if it be taken as appendant to land, infranchisement will not extinguish it. 6. Mod. 20. Mich. 2 Annæ B. R. in S. C.

(F. a) Revived.

1. A Parson had common *appendant to his parsonage* out of the lands of an abbey, and afterwards the abbot had the parsonage appropriated to him and his successors. By *Windham and Mead J. contra Dyer*, the abbot had not as perdurable estate in the one as in the other; for the parsonage may be *disappropriated*, and then the parson shall have the common again. *Godb. 4. pl. 5. Hill. 23. Eliz. C. B. Anon.*

2. Common appurtenant to a messuage was extinguished by unity of possession in the lord's hands. A grant by the lord of the *messuage with all common appurtenant*, does not pass the common extinct, but a grant of all commons *usually occupied with the messuage*, would have passed such common as the first was. *Mo. 467. pl. 663. Pasch. 39. Eliz. B. R. Sandeys v. Olliff.*

3. Common appurtenant to house and land is extinguish'd by [21] *purchase of the land*; afterwards the purchaser grants a lease of the house and land, *with all commons, profits, &c.* thereunto appertaining, or *used or enjoyed with the said messuage*, this grant of the common is good; for tho' 'twas not common in the purchaser's hands, yet 'tis quasi common used therewith; and tho' 'tis not the same common as was used before, yet 'tis the like common. *Cro. E. 570. Pl. 6. Tr. 39. Eliz. B. R. per 2. J. Bradshaw v. Eyre.*

4. If a copyhold messuage, to which common in the demesnes of the lord belongs *escheats*, and the lord grants it per nomina &c. *Communiarum quarumcunque dicto mesuagio sive tenemento &c. spectant' sive in aliquo modo pertinent' vel cum eodem mesuag' dimisso usitat'*. Adjudged, that this enures as a new grant of the same common, tho' the ancient common, which was by prescription, was determined by the unity of possession in the lord. *Cro. E. 794. pl. 40. Mich. 42 and 43 Eliz. C. B. Worledge v. Kingwell.*

5. A. seised of a manor in which was a custom, that every tenant for years of an ancient tenement, and close within the said manor, should have common of turbary &c. in the lord's waste, becomes seised likewise of an ancient tenement and close which had been parcel of the said manor; and the lord being so seised of the inheritance of the tenement, and close, and also of the manor, granted the

2 Brownl. 222. S. C. states it, that the messuage and close came into the lord's hands,

Common.

and that af. tenement and clofe to B. for a term, *with all commons appurtenant* towards he *to the said meffuage and clofe*. It was held by 4 juftices, that the granted it to common paffed. Bulft. 17. 18. Hill. 7 Jac. B. R. Grymes v. J. S. in fee, and that J. S. Peacock, bargained and fold to J. N. with all commons, profits, &c. ufed, occupied and pertaining to, &c. and after granted the wafte to another; and that it was conceived by all, but Williams J. that the leffee for years (by which he muft mean J. N. for he faid nothing before of any leafe for years) fhould have common, but that they did not give any abfolute opinion as to that.

(G. a) Suspended.

§ Rep. 79. I. Commoner takes a leafe of one acre, part of the land out of which his common is iffuing, his whole common is fufpend-
 a. Trin. 7 ed. 9. Rep. 135. a. in a nota of the reporter and cites 11 H. 6.
 Jac. S. P. 22. a. b.
 per cur. 2. Where a commoner diffeifes the lord of the foil, his common
 in Wild's case.—S. P. is fufpended for the time, and when the lord re-enters he fhall have
 Arg. Goldth. 34. in pl. 6. trefpafs for the fame trefpafs, and the commoner has loft his com-
 mon during this time, Br. Common. pl. 12. cites 16 H. 7. 11.

(H, a) Appendant. Pleadings.

Br. Com- I. ASSISE of common of pasture in F. appendant to his frankten-
 panner, pl. 17. cites S. C. ment in C. and made plaint of common in 200 acres of land,
 100 acres of meadow, and 100 acres wood, viz. in the third part of
 the land for all the year, and in 2 parts from the time that the grain
 is cut and carry'd away till it be reſown; and fo of the refidue, &c.
 with all manner of beaſts. Br. Plaint. pl. 28. cites 11 Aff. 5.
 2. In affiſe the plaint was of common with all manner of beaſts; per
 Fiſher, Goats and geefe are not beaſts of common; judgment of
 [22] plaint, & non allocatur; the reaſon ſeems to be becauſe it ſhall be
 intended beaſts which are commonable. Br. Common. pl. 42. cites
 25. Aff. 8.
 3. In action of common appendant, it is a good title, that I and
 thoſe whoſe eſtates, &c. have been ſeiſed time out of mind as appendant,
 Br. Preſcription, pl. 51. cites 31 Aff. 23.
 This ſhould 4. Affiſe of common in an acre of land from Michaelmas to Can-
 have been at dlemas, if the land be not ſown; and if it be ſown before Candle-
 (A a). mas, then of common from Mich. till the land be ſown, with all
 manner of beaſts; Finch. ſaid, Affiſa non; for he has there, of antient
 time, a houſe and 40 acres of land, and that which the plaintiff calls
 an acre of land is only a rood of land joining to his houſe; and becauſe
 his houſe was too ſtrait for his dwelling and his neceſſaries to his
 eſtate, he incloſed the rood of land, and upon part built a houſe neceſ-
 ſary to his eſtate, viz. 2 granges, and 2 pigeon-houſes, and of the
 remainder made a curtilege, and demanded judgment if affiſe, and
 was compelled to ſhew how much was built upon, and how much was
 curtilege, who ſaid that the moiety to the one and the reſt to the
 other; the plaintiff ſaid that this is an acre, and alſo that there is a
 chace

chace and re-chace of beasts from the vill, and that the house was large enough for the franktenement which he had in the same vill; and the issue was, whether it was inclosed for necessity or not, and not whether he had sufficient whereof before for his franktenement there; for this is warranted by the statute, that for necessity he may do it of his soil. *Wyl.* 2. 46, which speaks of augmentation of court necessary, or curtilage; quære if a man may inclose land where there is a common way? it seems that he may, leaving passage there. Br. Common. pl. 25. cites 32 Aff. 5.

5. In trespass, if the defendant justifies for common appendant in the same place, it is no plea for the plaintiff that this is his several, priest, &c. but ought to say further *absque hoc*, that he had common there *modo & forma*; quod nota; per judicium. Br. Traverse per, &c. pl. 42. cites 49 E. 3. 19.

6. In trespass in the county of G. the defendant justified, because he was villein of the prior of W. and that the said prior and his predecessors, time out of mind, have had common in the place, &c. appendant to the land in the county of W. for them and their tenants at will and villeins, by which he used the common, &c. and the plaintiff said that his several soil, priest, &c. & non allocatur, without traversing *absque hoc* that the other has common there prout, &c. by which he traversed accordingly; quod nota. Br. Replication. pl. 11. cites 49 E. 3. 19.

Heath's
Max. 72,
cites S. C.

7. In replevin, the defendant avow'd, because in the place where &c. the defendant and certain others, after the hay is cut and carry'd away, ought to have common there; but by custom there used none of them ought to have common there till the lord has first enter'd into the common with his beasts; and the bishop of L. is lord of the manor within which the place is, &c. and because the plaintiff had enter'd there to common before that the lord had enter'd with his beasts, he avow'd the taking; and per tot cur, this cannot be a custom; for if the lord will not enter, it is not reasonable that the commoner should lose his common. Br. Customs, pl. 12. cites 2 H. 4. 24.

8. In *quo jure* it is a good plea, that the plaintiff has nothing in the land to which he claims the common; quod nota bene. Br. Droit de recto. pl. 45. cites 7 H. 4. 12.

9. In trespass, a man need not prescribe in common appendant, but shall say that he is seised of an acre of land, &c. to which he has common appendant there, by which he put in his beasts, &c. Per cur. Br. Prescription, pl. 30. cites 4 H. 6. 13.

Br. Common, pl. 11.
cites S. C.
— For if he
prescribes, it
shall be in-

tended that he claims it by the prescription, and not as appendant; quod nota. Br. Prescription, pl. 30. cites 4 H. 6. 13.

10. Entry in nature of assise; the defendant claim'd common by which he used the common; *absque hoc*, that he claimed any thing in the land, unless the common; & *absque hoc*, that he has any other possession or estate in the land; and permitted; but the plaintiff imparl'd. Br. Traverse, per, &c. pl. 66. cites 8 H. 6. 33.

[23]

11. If a man brings assise de libero tenemento, and makes his plaint of common of pasture, the writ shall abate; for the writ shall be of common of pasture; per Paston. But Brook says quære legem of the writ of common of pasture. Br. Common. pl. 48. cites 11 H. 6. 22.

12. Note,

12. Note, by the king's attorney, where a *thing stands with common right*, as in the case of *common appendant*, it is sufficient to say that he has common for so many beasts, without alleging prescription; but otherwise in case of *common appurtenant*, which is against common right. Lat. 88. cites 18 H. 6. 25.

13. He who justifies for common appendant need not prescribe in it also. Br. Common. pl. 35. cites 21 H. 6. 10.

Br. Tresp.
pals. pl. 30.
cites S. C.

14. In *trespass* 'twas admitted a good bar, that the plaintiff [defendant] is *seised of such an acre, and that he and all those whose estate, &c. have had common* in the place where the trespass is supposed, &c. time out of mind; per quod he used his common, which is the same trespass, &c. without shewing appendancy or otherwise, and yet 'twas said that in *assise* thereof, or by way of title, 'tis otherwise for there he must shew certainly; note the diversity. Br. Titles. pl. 2. cites 33 H. 6. 32.

15. Trespass of trees cut, the defendant prescribed there for him- and his tenants at will in his manor of B. to take estovers in B. to enter the place where, &c. to repair ancient hedges within the same manor, and to burn in halls, chambers, kitchens and ovens in the same manor, and said that he took the trees at the time, &c. to burn within the same manor, &c. Per Fairfax, he ought to shew a certain place where he burnt them, for this can't be in a new-built place, & non allocatur; for he may burn it in any place within the manor, and if he burns them otherwise than he ought, this may come in issue by shewing of the other party; but by all the justices, if he justifies to mend hedges of the manor, he shall shew certain what hedge he amended; for issue may come of it, whether the hedge was sufficiently repaired or not at the time, &c. Br. Common. pl. 31. (30) cites 7 E. 4. 27.

But in some
cases he ought
to say that
he and those
whose estate,
&c. have had
common for
them and
their tenants
at will, &c.
Br. Com-
mon. pl. 12.
cites 9 E. 4. 3.

16. In trespass the defendant justified, because he, and all those whose estate he has in such lands, have had common appendant to the said land in the place where, &c. with all manner of beasts levant and couchant upon the same land, by which, &c. Per Fairfax, this is common appurtenant; for if it be common appendant he shall not have common with all manner of beasts; per Littleton, it is a good plea, that such a one whose estate, &c. have had common, &c. who leased to the defendant at will, by which he put in his beasts, &c. as well as tenant for years, &c. Br. Common. pl. 12. cites 9 E. 4. 3.

As if I have a manor in which have been tenants at will, time out of mind, who have used common in right of the lords of the manor, &c. in this case he cannot say that he and all those whose estate he has have had common; for this was not used by them but by the tenants at will. Ibid.

As in tresp-
pals of a
close brot-
ken, if the
defendant
says that

17. Where one justifies as servant to several defendants, this ought to be severally likewise, viz. *so many beasts for the one, and so many beasts for the other, & sic de singulis*. Br. Common. pl. 9. cites 15 H. 7. 10.

A. G. has common thereto and B. the like, and C. the like, and he, as their servant, and by their command, put in the beasts, this is double; per cur. But if he says that he put in 2 beasts for A. and 3 for B. and the rest for C. this is a good plea, and is not double; per cur. Br. Double Plec. pl. 59. cites S. C.

18. In *trespass*, the defendant justified as commoner to dig the land, to keep the water out of the common, and out of his own land adjoining; and by the best opinion it is double. Quere. Br. double. pl. 111. cites 13 H. 8. 15.

19. If one has an *assise* of common and pending the writ he uses the common, the writ shall abate; but, if the cattle escape into the land, it shall not abate the writ, altho' they feed there. F. N. B. 180. (M.) Thel. Dig. 188. Lib. 12. Cap. 24. pl. 1. cites 33 Aff. 12. S. P.

20. In *assise* of common, all the tenants of the land, out of which the common is, ought to be named. F. N. B. 180. (L.)

21. If the common be apportioned by the purchase of part, and an *assise* is brought, the *tertenant* of the land charged with the residue of the common, shall only be named; resolv'd. 4. Rep. 38 a. Mich. 26 & 27 Eliz. B. R. in Tiringham's case.

22. There needs no prescription for common appendant, because such common is of common right, and commences by operation of law in favour of tillage. Per cur. 4 Rep. 37 2. Mich. 26 & 27 Eliz. B. R. in Tiringham's case.

23. In replevin, the defendants made confusion as bailiffs to G. B. damage-feasant, the plaintiff replied, and prescribed, that he and all those whose estate he hath in 40 acres, have had common for all manner of cattle in 6 acres, whereof the place where, &c. is parcel; the defendants rejoined, that the plaintiff had common in 40 acres; whereof the 6 acres are parcel, and that before the taking, &c. the plaintiff had purchased two acres parcel of the 40 acres, by which the common was extinct; and upon demurrer it was argued, that the common for the 6 acres shall be intended common in 6 acres only; for common in 40 acres cannot be intended the common in 6 acres; and the whole court was clear of opinion, that this rejoinder was not good without a traverse (viz.) *absque hoc*, that he had common in 40 acres, of which the 6 acres are parcel. Le. 43. pl. 56. Mich. 28 and 29. Eliz. C. B. Kimpton v. Bellamie. And. 159. pl. 203. 8. C. but S. P. does not appear — Gouldsh 53. pl. 4. S. C. but S. P. does not appear.

24. If the husband seised in right of his wife pleads, that he and all those whose estate they had, have used to have a common appendant; per cur. that is naught, for the estate is in the wife; but he ought to have pleaded, that he and his wife, and all those whose estates the wife has, or whose estates they have, &c. Noy. 66, 67. Godbolt v. Mallet.

25. Plaintiff counted that the defendant put in his beasts, &c. The jury found, that he did not put them in, but that they came in by escape; yet the plaintiff shall have judgment; for the feeding of the grafs is the substance adjudged. 9. Rep. 113. b. cited per cur. as Hill 5. Jac. C. B. Ingleland v. Crogate.

26. A. seised of 2 yard land to which common was appurtenant, for 4 beasts, 2 horses and 60 sheep, demised divers parcels of the 2 yard-land to J. S. and R. S. for 400 years, who entered and were possessed. In replevin A. prescribed, that the place where was part of the common, and that he was and is seised of 2 yard-land, and that he and all those whose estates, &c. The avowant traversed the prescription, and upon the finding the whole matter as before, it was adjudged for the plaintiff; for the prescription had been true, tho' A. had

had demised all the 2 yard-land, for he is seised in his demesne as of fee of the freehold of them, to which, &c. and the inheritance and freehold of the common, after the years ended, is appendant to the lands, and so the issue found for the defendant; and had the avowant not traversed the prescription, but pleaded the lease, yet that would not have suspended or discharged the common; for in such case, each should have common ratably, so as the common be not surcharged. 13. Rep. 65. Hill. 7 Jac. C. B. *Morse v. Webb*.

[25] 27. There is no difference when the prescription is for cattle *levant and couchant*, and for a certain number of cattle *levant and couchant*; but when the prescription is for common appurtenant to land, without alledging, that it is for cattle *levant and couchant*, there a certain number of the cattle ought to be expressed, which are intended by the law to be *levant and couchant*. 13 Rep. 66. Hill. 7 Jac. C. B. *Morse v. Webb*.

28. A man prescribes to have common in 100 acres, and shews, that he put his cattle in 3 acres, without saying, that those 3 acres are parcel of the 100, yet good; and *Hitcham* said, that so it was adjudged in this court. *Hetl.* 137. Pasch. 5 Car. C. B. in *Moor's* case.

29. A man alledged a custom to put in his horses, &c. and the custom was for horses and cows, and adjudged good, cited by *Richardson* as a *Huntingtonshire* case. *Hetl.* 137. Pasch. 5 Car. C. B. in *Moor's* case.

30. In trespass, &c. the defendant pleaded, that A. and his wife were seised of the manor of C. and of a parcel of land containing 42 acres, and of a messuage and 2 yards-land parcel of the said manor in the right of his wife for life, the remainder to J. S. and that they all joined in a fine of the said messuage and 2 yard-lands to the defendant and his heirs, and further, by the said fine, granted him common for 4 horses, 5 beasts, &c. in the said manor and lands, and that he put in his cattle to use the common; it was objected, that the plea was not good, because he doth not plead, that it was waste or common; but *Berkley* and *Crooke* held the plea good, and that by the plea, as the fine is, he may claim common in any part of the manor; for there is not any restraint to the waists or commons, but it is granted generally in his manor; and for that point they agreed (*cæteris justiciariis absentibus*) to give judgment for the defendant; but for another part, wherein the lessee prescribed to have common it was clearly ill, it was adjudged for the plaintiff. *Cro. C.* 599. pl. 20. *Mich.* 16 Car. B. R. *Stringer's* case.

Ibid. 29, the reporter, who was of counsel with the plaintiff, adds a note, that there was another fault in the plea, because it was not averred, that the cattle were *levant*

31. Trespass for breaking his close, &c. treading down his grass, and feeding it with cattle; the defendant, as to breaking the close, pleads Not guilty; and as to the rest he pleads in bar, that Sir T. B. was seised of the manor of W. and prescribes in Sir T. B. for common in the place where, &c. for all his commonable cattle *levant and couchant*, &c. and saith, that the said Sir T. B. did appoint the defendant to take care of his cattle put into the said close; and further, that the said Sir T. B. caused several of his commonable cattle to be put therein, whereupon the defendant entered into the said close to see that they had no damage, and in entering he trod down the grass there, which is the same residue of the trespass; and upon demurrer to this plea

plea adjudged to be ill, because the defendant did not shew, that those were his own cattle, or that he put them into this close, for otherwise he cannot be guilty of a trespass; and here the defendant had justified the trespass with cattle, and yet he has not confessed it or said any thing to that purpose; so that his plea being ill in part is ill in all, such an entire plea not being dividable; and of that opinion was the whole court, and judgment for the plaintiff. Saund. 27. Mich. 18 Car. 2. Manchester (earl) v. Veal.

and cou-
enant upon
the manor;
but that this
was not
moved.

32. Commoner brought an action for inclosing and depriving him of his common; and sets forth the custom, that for 2 years, when the land used to be sowed, he had common from the time that the corn was reaped, quousque refeminaretur, and every third year, when the land used to lie fallow, he had common per totum annum. It happened the land was not sowed in seven years or more, the question was, What common the party might claim? (and by Hale) he had right to put in his cattle per totum tempus that it was not sowed; for when his cattle were in, he was not bound to take them out quousque refeminaretur; and if the owner did not sow it, he might continue his cattle. Freem. Rep. 23. pl. 31. Hill. 1671. Walker v. Miller.

33. It was held, that a man may justify putting in his cattle *hac vice by a licence*, without saying it was by deed; but if it be a licence to put in his cattle for a certain time it must be by deed, for that is tantamount to a grant of common. Freem. Rep. 190. pl. 194. C. B. Smith v. Fetherwell. [26]

34. In case brought by a commoner against a stranger, for putting his cattle into the common per quod communiam in tam amplo modo habere non potuit, the defendant pleads a licence from the lord to put his cattle there, but does not aver there is sufficient common left for the commoners, and therefore adjudged no good plea; and tho' it was objected, that the plaintiff might reply and shew that there was not enough, yet it was agreed that he need not, the declaration as to that being full enough, and it being the very gift of the action, the defendant should have pleaded it. 2 Mod. 6. Hill. 26 & 27 Car. 2. C. B. Smith v. Feverel.

Freem. Rep.
190. pl. 194.
Smith v.
Fetherwell,
S. C. held
accordingly
—But in an
Action upon
the case by
the commoner
against the
lord, the
plaintiff
must particu-

larly shew the surcharge. 2 Mod. 7. per curiam in S. C.

35. A commoner brought an action upon the case for eating up his common, and declar'd, that he was seised of Black-acre to which he had common appendant, &c. Exception was taken, because he did not shew what title, or what estate he had to or in Black-acre; but it was over-ruled, for that it was but a possessory action, and his seisin of Black-acre but inducement. Freem. Rep. 458. pl. 624. Mich. 1677. Anon.

36. Adjudged, that if a man has common for a certain number of cattle belonging to a yard-land, he need not say levant upon the yard-land; sed aliter, if it were for a common sans number. 2 Mod 185. Hill. 28 and 29 Car. 2. B. R. Stevens v. Austin.

37. In replevin, the defendant avowed for damage feasant on his common; and upon a demurrer to his avowry it was adjudged not good, because he did not shew some particular damage to himself, or that he could have his common in tam amplo modo quo debuit & consuevit; Lev. 104. Woolton v. Salter, S. C. Pasch. 35. Car. 2. C. B.

and tho' a precedents were cited, the one out of Raftal's Entries, and the other out of Coke's Entries to the contrary, that the court took no regard to them, they being without argument, and they took the law to be all one in *avowry* as in actions on the case, that commoners cannot distrain any more than they can have action on the case, without alleging, that he is damaged in the common.

38. In *replevin* for 6 cows, the defendant *avows* for damage *feasant*, plaintiff replies a *seisin* of certain lands, and a right to common of pasture for beasts *levant* and *couchant* on those lands; and those 6 cows being his cattle, and *levant* and *couchant* there, he put them in, &c. Defendant rejoins with an *absque hoc*, that those were the proper cattle of the plaintiff *levant* and *couchant* on those his lands; demurter thereto; the court held the traverse good, and the judgment was for the avowant. 2 Show. 328, 329. pl. 337. Mich. 35 Car. 2. B. R. Mannetown v. Trevilian.

39. In case against J. S. for putting his cattle into the common, sufficiency of the common, whether the commoner has sufficient or not, is traversable, if pleaded so by the defendant; but case, &c. against the lord too will lie, if he overcharge the common, at the suit of a commoner; but the lord may put into the common beasts of warren as well as other beasts. 1 Lutw. 101. 107. Hill. 6 W. 3. Hafard v. Cantrell.

And in such an action against the lord, the surcharge must be particularly set forth, that the copyholder could not enjoy his common; but the plaintiff need not shew the surcharge particularly against a stranger. 2 Mod. 6. 7. Hill. 26 & 27 Car. 2. C. B. Smith v. Feverell.—Freem. Rep. 190. pl. 194. S. C. Held that in action for putting in cattle whereby he could not enjoy his common in tam amplo, &c. and the defendant pleads the licence of the lord, he ought to aver that there was sufficient common left.

[27] 40. Common was claim'd thus, viz. a *tempore fractionis campi* (it being a common field) until &c. After verdict for the plaintiff, it was moved to be infensible and uncertain what common was here claim'd; and though a *fractione campi* may be an expression in the country, yet the law knows not the meaning of it; and Holt Ch. J. was of that opinion, but Gould J. held it well after verdict, though it had been ill on demurrer; but Holt Ch. J. said, the verdict cannot aid a thing unintelligible; for it has only found the common as the plaintiff has replied; sed adjournatur. Ld. Raym. Rep. 645. Hill. 13 W. 3. Hockley v. Lamb.

41. In *trespass* against a commoner, he may plead not guilty, and give his right of common in evidence, cited by Holt Ch. J. to have been so held; but he said he cannot think so, but he ought to plead specially, and shew his title; otherwise of the lord of the waste, he may plead not guilty and give his title in evidence. 2 Ld. Raym. Rep. 1134. Pasch. 4 Annæ, in case of Winton Mayor v. Wilks.

42. A man that claims common in another man's land must set forth a title; but one that is in possession need not set out a title. 11 Mod. 53. pl. 29. Pasch. 4 Annæ, B. R. Anon.

10 Mod. 184. 43. *Replevin*; the defendant avowed for damage *feasant* in 100 acris terræ parcel communæ pasturæ &c. but because it was not set forth that he could not otherwise enjoy his common, judgment was against

against him; for without a particular damage, a commoner cannot distrain the cattle of a stranger, nor can he have an action upon the case, without saying that he could not otherwise enjoy his common. And here it was held, that *communia* did include the place in which &c. so that if this be the sense of the word in any case, it shall be here so intended after a verdict; the same answer serves as to the word *terra*, and it shews that it is taken in the sense of the word, which is not so proper and strict as the other, (i. e.) it is not so formal, and uncertainties are always help'd by a verdict. Trin. & Mich. 12 Ann. B. R. Jackson v. Laverack.

being inclosed than a rent, but [in the margin says, that] judgment in C. B. was affirmed, because the word *communia* used in the declaration does in common parlance, and in acts of parliament signify a common, though in legal proceedings it is generally used for an incorporeal right.

urged, that the word *communia* signified not the place, but the right of commoning, and a right being a thing of an incorporeal nature, was no more capable of

(I. a) In Grofs, &c. Pleadings.

1. **I**N trespass, the defendant justified for common appendant by prescription. The plaintiff said, that de son tort demesne, absque hoc that the defendant had common there, and so to issue without argument. Br. De son tort, &c. pl. 43. cites 22 Aff. 42.

2. Assise of common by the parson of D. and made his plaint of common in grofs, and that he and his predecessors, parsons, have been seised of land, &c. The defendant said, that never seised as in grofs, and if &c. seised as appendant at his will, and it was accepted for a good plea. Br. common, pl. 44. cites 33 Aff. 9.

3. Trespass of trampling his grafs; Moile said, that the defendant is seised of such a house, and he and all those whose estate he has in the house, have had common in the place where &c. time out of mind, for 20 beasts, by which he put in 12 beasts to use the common. Judgment &c. Per Newton, the prescription is not good; for he ought to claim as common appendant, or common in grofs, and he does not shew that this is common appendant, nor does he claim the common as for beasts levant and couchant upon the said house, nor that he ought to have common by reason of the said house, and he cannot claim as common in grofs, if he does not say that such a one, and all his ancestors have had such common time out of mind in the said soil, who has granted to the defendant the common. Br. prescription, pl. 26. cites 22 H. 6. 42. [28]

4. In trespass for depasturing his close with sheep, &c. the defendant justified, for that the prior of D. was seised in fee of Bl. acre in D. and of the pasturage in the place aforesaid for all sheep levant and couchant in Bl. acre at all times in the year. After judgment for the defendant, it was assign'd for error, that the defendant did not intitle the prior to this common, either by grant or prescription, and this being a profit appender in alieno solo, none can intitle himself by the course of the common law, but by one of those means, and this pasturage is only in nature of common. But it was answered, and the court inclined, that tho' pasturage claimed for sheep levant and couchant upon the defendant's land is common appendant, and cannot be severed from the soil by grant, and then to prescribe for it

is not good; but tho' it be not good at common law, yet the statute 31 H. 6. makes it good by pleading, that the prior was seised thereof in fee at the time of the dissolution. Cro. C. 542. pl. 7. Pasch. 15 Car. B. R. Daniel v. the earl of Hertford.

(K. a) Prescription. Pleadings.

Trespas of feeding his grass; the defendant said, that he and his predecessors have had and used common in the place &c. as appurtenant to a house and 100 acres of land in H. time out of mind. The plaintiff said, that the place is his several, absque hoc that the defendant and his predecessors ever had common there appurtenant to their franktenement in H. modo & forma, and because this traverse goes whether he had common there or not, which is to the right, as in quo jure, where this action is to try the possession, Thorpe drove him to try the usage, by which the plaintiff travers'd the usage; quod nota. Br. traverse per &c. pl. 169. cites 22 Aff. 63.

2. In assise of common of pasture appendant &c. the defendant said, that the vill of D. where he claims common, and the vill of C. to which he claims it, do not intercommon, by which the plaintiff prescrib'd, and good, and issue may be taken in assise upon the prescription. Br. prescription, pl. 90 cites 30 Aff. 42.

3. In trespass, commoner justified the taking of beasts by custom, because the custom is, that none shall put his beasts there after the corn cut and carried away till Mich. and because the plaintiff put his beasts there he took them, &c. and said, that he was lord of the vill, and the other said, that the usage extends as well to the lord as to other men, and the others contra. Br. customs; pl. 9. cites 46 E. 3. 23.

4. Where the defendant justifies for common, by prescription, for all manner of beasts, it is no replication, that he has common there for all beasts except sheep and hogs, but shall traverse also, absque hoc, that he has common with all manner of beasts modo & forma, &c. Br. traverse, &c. pl. 148. cites 14 H. 6. 6.

5. If a man has common in a waste for 100 sheep, as appurtenant to a house and certain land, and after purchases another house and land, to which is common appurtenant for another 100 sheep by prescription, he must in pleading make 2 several prescriptions to the said several houses and lands for the 200 sheep, and not join them both together, for they are 2 distinct commons. D. 264. a. pl. 59. Trin. 4 & 5 P. [29] & M. Basket v. Mordant.

6. If A. seised of 20 acres, to which common is appendant, incoffs B. of 10 acres, and B. is to prescribe, he must prescribe specially, viz. to have common in the whole till such a day, and then shew the purchase of part, and that from that time he has put his beasts into the residue, pro rata portione; per cur. 4 Rep. 37. b. 38. a. Mich. 26 and 27 Eliz. B. R. in Tirringham's case.

7. In case, the plaintiff declar'd, that *usitatum fuit* within the manor, that every copyholder within the manor should have common, in such

Bendl. 74.
pl. 116.
Mich. 5 and
6. P. & M.
the S. C.
held accord-
ingly.

Goldsb. 123.
pl. 30.
Pearce v.

such a waste of the lord's *for two sheep for every acre of arable land*, and that the defendant (the lord) had digged holes and burrows therein *for conies*, and so had disturbed him of his common; it was objected that a prescription by the copyholder against the lord is not allowable; but the court held the prescription was good, for where the prescription is against the lord himself, there it is to be laid by way of usage; otherwise where he prescribes against a stranger, there the prescription ought to be alledged in the lord. Cro. E. 390. pl. 12. Pasch. 37 Eliz. B. R. Pearce v. Bacon.

to the action, he doubted whether this will alter the action; but per Glanville, tho' the copyholder cannot prescribe but in right of his lord, yet by way of usage as this case is, it has been adjudged that he may make his title.

8. One prescribed for common; 'twas found that he had common by prescription *paying a penny*; adjudged that this was an entire prescription, whereof the payment of the penny is parcel, and ought to have been entirely alledged. Cro. E. 546. pl. 49. Hill. 29 Eliz. C. B. 563. pl. 22. Pasch. 39 Eliz. C. B. Lovelace v. Reignolds.

holder prescribed to have common in the lord's land, and it was traversed and found that he had common according to his prescription, and 'twas further found that the copyholders in the same manor had used to pay to the lord *pro eadem communia unam gallinam & quinque ova per annum*, and adjudged that the prescription was well pleaded; for there were 2 prescriptions, one for the commoner, the other for the lord, and so 'twas sufficient for the commoner to alledge the prescription for the common, and need not meddle with the other, and the finding the prescription on the lord's part is not material. Cro. E. 563. in the case of Lovelace v. Reignolds.

9. A prescription for the inhabitants of the vill of Dale to have common, is a void prescription. Arg. 2 Bulst. 87. cites it is adjudged, Trin. 2 Jac. C. B. Tinnery v. Filher.

10. In trespass, the defendant justifies for common for all his beasts *levant and couchant in the place &c. by prescription, and put in his cattle utendo communia*. Exception was taken, that he did not aver that his cattle were *levant and couchant*; sed non allocatur; for the want of averment is help'd by the statute of Jeofails; and judgment for the defendant. Cro. J. 44. pl. 12. Mich. 2 Jac. B. R. France v. Tringer.

11. Replication in avowry prescribed to have common appurtenant, but doth not shew and aver, that the cattle were *levant and couchant* upon the land &c. and for that it was held to be naught by the court; and cites 15 E. 4. 32. Noy. 145. Jeffry v. Boys.

12. The custom of a manor was, that every tenant for years of an ancient tenement and close within the said manor, should have common of turbary &c. An ancient tenement and close were severed from the manor, and the inheritance of the said tenement &c. and also of the manor coming to A. He granted the messuage &c. to the defendant, with all commons appurtenant to the said messuage &c. In trespass for taking turf the defendant pleaded, and justified by an *usitatum fuit*, that it had been there used *times out of mind*, that every tenant for years of &c. used to have common of turbary &c. and that the messuage &c. was an ancient messuage, and the same granted unto him with all commons appurtenant to the same &c. It was clearly agreed by all the court, that this prescription so laid

with an *usitatum* was not good, and judgment was given for the plaintiff. Bullst. 17. Hill. 7 Jac. B. R. Grymes v. Peacock.

13. If a *copyholder* prescribes to have common in the soil of *f. S.* he ought in this case to prescribe in the name of the lord. But if he prescribes to have common in the lord's waste, then his prescription is to be with a *usitatum fuit*. Per Fleming Ch. J. Bullst. 19. Hill. 7 Jac. in case of Grymes v. Peacock.

14. Prescription for every householder to have common in alieno solo is not good. Bullst. 183. Pasch. 10 Jac. Ordway v. Orme.

Brownl.

172. Richards v. Young. S. C. but no resolution.

15. It was insisted, that in pleading common it *must appear, that the place in quo, &c. est infra manerium*, because the custom of the manor can't extend out of the manor, but he ought to prescribe in the lord of the manor; curia advisare vult. Hob. 286. pl. 371. Trin. 16 Jac. Roberts v. Young.

a Roll. Rep.

173. Anon. S. P. and seems to be S. C. and Bridgman said, that all manner of beasts, besides sheep and yearlings, shall be called magna a-veria.

16. In trespass &c. for chasing his gelding, the defendant justified for damage-feasant as in his freehold; the plaintiff replied, that he was seised of a messuage and such lands in M. in fee, and so prescribed to have common in the place where &c. *pro 25 magnis averiis, every year after May day*, and therefore put in his gelding to use his common. It was moved in arrest of judgment, that his plea was not good, because uncertain what were *magna averia*; but adjudged, that it may well be intended horses, oxen, kine, and other such commonable beasts, which are known among the people there by such common phrase, and issue be join'd and found, it is good enough. Cro. J. 580. pl. 10. Trin. 18 Jac. B. R. Standred v. Shoreditch.

S. C. cited by the reporter 2. Lutw.

470.—In trespass, the defendant justified for damages feasant; the plaintiff in his replication prescribes for common until

the field was sown, and after it was sown, & post blada illa messa until it was sown again; and upon demurrer it was said, that this prescription was unreasonable (*viz.*) to have common in land sown; but adjudged, that the common was not claimed by this prescription until after the corn reaped. Vent. 21. Pasch. 21 Car. B. R. Walter v. Channer.

And therefore where appendancy was alledg'd in the declaration to be to the site of the manor and other lands, and the plaintiff did not prescribe for the other lands, but only in the site, it was adjudg'd for the plaintiff. Palm. 360. S. C.

18. In case of common appendant there needs no prescription at all; but the declaration is good without it. Palm. 360. Pasch. 21 Jac. B. R. Carvil v. Holt.

a Roll. Rep.

346. S. C. adjudged.—

19. In case the plaintiff declared, that *diu fuit & adhuc seistus existit* of an house &c. and so prescribed, that he, and all those whose estate he had in the said house &c. had used to have common in the waste

waste of L. and that the defendant &c. made coney-burroughs in the waste, *quorum quidem præmissorum* (not saying *prætextu*) he lost his common. * After judgment for the plaintiff error was assigned, that *diu seifitus* was not good, for that may be as well one year as 40; and the word (*prætextu*) being left out, the declaration is uncertain, both as to the time and damages; and therefore the judgment was reversed. Godb. 347. pl. 442. Trin. 21 Jac. B. R. Lee v. Griffel. Griffel v. Lee, S. C. adjudg'd for the defendant. Ibid. 319. Greefley v. Lea S. P. does not appear. —

Jo. 12. pl. 13. Mich. 18 Jac. C. B. S. C. but S. P. does not appear. — Win. 16. Grice v. Lee. Mich. 19 Jac. in C. B. S. C. Judgment nisi.

* [31]

20. Case &c. in which the plaintiff declared and prescribed for copyholders of 30 acres to have common in 4 acres, for certain beasts, from the 1st of August to the feast of All Saints, and that he was a copyholder of 30 acres; and that the defendant on the 1st May had inclosed the said 4 acres &c. After verdict; and it was moved in arrest of judgment, that the plaintiff ought to have prescribed for cattle *levant and couchant*; sed non allocatur, because he had prescribed generally. 2 Roll. Rep. 379. Mich. 21 Jac. B. R. Colson v. Perry.

21. In case for the making of a coney-burrow in damage of his common, the plaintiff prescribed to have common *omni tempore anni*, and says *not quolibet anno*; and after verdict adjudged good. Hutt. 71. Mich. 21 Jac. Bickner v. Wright.

22. Adjudged, that a prescription to have common for all his cattle *commonable* is not good, because he may in such case put in as many beasts as he will; but a prescription to have common for his cattle *commonable, levant and couchant* &c. is good. Mar. 83. pl. 137. Pasch. 17 Car. B. R. Say's case.

23. In pleading prescription for common it must be alledged for beasts *levant and couchant*, or otherwise the bar is ill. 2 Lutw. 1359. Hill. 2 & 3 Jac. 2. Clerk v. Johnston. The want of it is ill on general demurrer, but cured by

Verdict. Lev. 196. Mich. 18 Car. 2. B. R. Cheadle v. Miller. — Sid. 313. pl. 29. Cheedley v. Mellor, S. C. adjudged — And levancy and couchancy is not sufficient without property also. 2 Show. 328. pl. 337. Mich. 35 Car. 2. B. R. Manneton v. Trevillian. — But a special property is [it seems] sufficient. See 2 Show. 329. S. C.

24. In case the plaintiff declared upon a custom of commoning in such a place, the defendant demurred, for that the custom was not well laid; for the plaintiff declares of a custom of commoning, *pro averiis*, viz. *pro equis, bobus, equabus & pullis*, and the word (*pullis*) is of an uncertain signification; for it may signify a calf, a lamb, or any other young beast or fowl, and 23 Car. Segar and Dyer's case was cited. The court held the exception good, and said, that is uncertain what is meant by the word (*pullis*), and said, that if the prescription had been *pro omnibus averiis*, it had been good, and the viz. should have been void; but here it is only *pro averiis*; therefore nil capiat per billam. Sty. 289. Trin. 1651. B. R. Chapman v. Brook.

25. Plaintiff prescribed for all the copyholders of Bl. Acre in the manor of D. to have common in A. The defendant demurred, for that the plaintiff should have prescribed in the lord's name, A. being

ing out of the manor; but the truth being that *A. was anciently parcel and lately sever'd by the lord*, the court held, that this does not destroy the custom, but that the copyholder ought to prescribe specially, *that talis consuetudo fuit till such a day, and that after the lord granted A. over, &c.* as in Lutterell's case on the charge of a corporation. Keb. 652. pl. 28. Hill. 15 & 16 Car. 2. B. R. Davy v. Watts.

[32] 26. In trespass the defendant justified damage feasant, the plaintiff prescribed for common *quibuscumque duobus annis, that the ground was sown with corn, in simul concurrentibus, when it was sown, and after the mowing of the said corn till it were resown*, which per Bigland is a void prescription, being as well for the time that the ground is sown as not, sed non allocatur especially the trespass being laid in a fallow year, and judgment pro plaintiff. 2 Keb. 491. pl. 41. Pasch. 21 Car. 2. B. R. Chandler v. Melland.

27. There is a difference in prescribing for common appurtenant and common in gross sans number in a natural person. As to common appurtenant a man shews his seisin in fee of land to which he claims his common, and then says *quod ipse & omnes illi quorum statum ipse habet, in the same land de temps &c. habuit communiam pasturæ in the place where, &c. pro averiis suis levant & couchant on the land to which, &c.* but the prescription for common in gross is where one lays no seisin of any land, but says, *Quod ipse & omnes antecessores sui quorum heres ipse est de temps dont, &c. have had common in the place where, &c. pro omnibus averiis suis*, without referring to any land, and without saying levant and couchant, because there is no land on which they may be levant and couchant, or to which the common may be appurtenant; per Saunders counsel. Arg. 1 Saund. 345. 346. Mich. 21 Car. 2. in case of Mellor v. Spateman.

Vaugh 253.
Mich. 20.
Car. 2. C.B.
in case of
North v.
Coe, where
the plea was
that the
freehold and customary tenants have had and enjoy'd per consuetudinem maneril solam & separalem pasturam. Exception was taken that this plea did not set forth the custom of the manor, but implicitly, and that it was a double plea both of the custom of the manor, and of the claim, by reason of the custom, which ought to be several, and the court shall judge, and not the jury, whether the claim be according to the custom alleged.

28. The customary tenants of a manor may allege a custom *pro sola & separali pasturæ* in &c. quolibet anno per totum annum, &c. but if any tenants of the freehold at common law will claim any such profit or benefit, they ought to shew their estates, and to prescribe the name of the tenant in fee by a que estate. Arg. 2 Saund. 326. Pasch. 23 Car. 2. in case of Hoskins v. Robins.

29. Trespass for taking 2 mares in B. the defendant said that the king was seised of B. and he took them damage feasant as bailiff to the king. The plaintiff replies he was an inhabitant of C. and that the mayor and burgesses of C. had common of estovers of turfs for them and for every inhabitant to burn in quibuscumque messuagiis suis. Vaughan said tho' inhabitants cannot prescribe for common in their own names, they may be capable of the benefit of such a prescription, and as this prescription is laid for the mayor and burgesses, they may prescribe for them and for the inhabitants, and that is the direction given in 15 E. 4. 29. by Littleton, judgment was given for the plaintiff. Freem. Rep. 135. Mich. 1673. White v. Coleman.

30. Error

30. Error upon a judgment in C. B. where the plaintiff declared in an action upon the case, that he had common in the defendant's lands, & habere debuit, &c. The defendant demurred, because *not set out how the plaintiff was intitled to the common, whether by prescription or otherwise*; notwithstanding which judgment in C. B. was for the plaintiff, and now the same matter insisted on for error here, and the court doubted; adjournatur. Vent. 356. Mich. 33 Car. 2. B. R. Bound v. Brooking.

31. Prescription in avowry was *pro communi pastura* instead of *pro communia pastura*, and adjudg'd ill. 3 Lev. 104, 105. Mich. 35 Car. 2. C. B. Woolton v. Salter.

32. In trespass &c. the defendant justified damage-feasant; the plaintiff *prescribed for common for sheep*; the defendant *traversed the prescription*, and the jury found that the plaintiff had common for sheep, and also for cows; it was objected that this verdict would not maintain this prescription, because it was larger than the prescription pleaded; *but the plaintiff had judgment. 4 Mod. 89. Pasch. 4 W. & M. in B. R. Bridges v. Saer.

several, distinct, and different.—Show. 347. Bruges v. Steer, S. C. adjudged for the plaintiff.—4 Mod. 89. S. C. adjudg'd for the plaintiff.—Carth. 219. Bruges v. Searle. S. C. and the court held that it was a general verdict for the plaintiff, and the finding for the cows is surplusage and void; besides as the action was brought only for taking sheep, the plaintiff might well abridge his prescription as to them only, since nothing else was in dispute, and finding as to the cows does not falsify, but stands well with the prescription.

* [33]

33. In case it was held that a prescription for an *inhabitant* or *occupier* to have common was not good, whereupon the plaintiff brought a new action, and *declared upon a custom*. The case was argued, and the court inclined against the custom, sed adjournatur. Lord Raym. Rep. 405. Mich. 10 W. 3. C. B. Weekly v. Wildman.

34. A man cannot prescribe *for common appurtenant to a farm*, because it is uncertain what a farm consists of, whether of 10 acres or of 100 acres, but the prescription ought to be laid to a messuage and so many acres of land; but if there is an *ancient farm*, and the *same lands always occupied with it*, a man may have common of pasture to depasture his cattle tilling that farm; per Holt, Ch. J. at Winchester assises, 10 W. 3. Lord Raym. Rep. 726. Hockley v. Lamb.

35. Customary freeholders may prescribe for common by a *questate*. 2 Lord Raym. Rep. 1188. Trin. 4 Annæ, in case of Follet v. Troake.

[For more of common in general, see Actions (N. b.) Assise (D) Copyhold, Inhabitants (B) Levand and Couchant, Nufance, Profit Apprender, and other proper titles.

Fol. 405.

Commoner.

(A) Commoner. [His Interest in the Common;
and] *what Things he may do,*

Cro. J. 195. [1. **I** F a lord of a common makes coney-burrows in the common, and stores them with conies, though he hath no warren, yet the commoners cannot justify the killing the conies that they may not encrease, to the prejudice of the common. Mich. 5 Jac. B. R. before Court on the *tween Hodson and Griffel* adjudged.]

First motion

were of opinion against the plaintiff, because conies are *feræ naturæ*, but afterwards all the justices adjudg'd for the plaintiff; for a commoner has nothing to do with the land but to put in his cattle, and may not meddle with any thing of the lord's there, and as the lord may have great beasts there, so he may have beasts of warren, and the commoner cannot destroy them.—Yelv. 104, 105. *Hoddesden v. Griffel* S. C. adjudg'd; for tho' the owner of the soil has no property in the conies, yet so long as they are in the land he has possession, which is good against the commoner, and conies are matter of profit to the owner of the soil for housekeeping.—Brownl 208. *Hoddesden v. Griffel*, S. C. but seems only a translation of Yelv.—Brigsm. 10. cites S. P. adjudg'd Mich. 5 Jac. and seems to intend S. C.—S. C. cited Lutw. 108.—The commoner may have action on the case, or an assize for putting the conies upon the land, if the owner of the land leaves not sufficient common for the commoner's cattle; but he cannot justify killing the conies. 2 Le. 201. 203. pl. 254. Mich. 29 Eliz. B. R. Anon.—Goob. 122 pl. 144. Hill. 29 Eliz. B. R. Cony's case seems to be S. C. and adjudg'd that the commoner cannot kill the conies.—4 Le. 7. pl. 32. Trin. 26 Eliz. Ould v. Conye. S. P. adjudg'd.

* [34]

2 Bulst. 115. [2. **[And]** if the lord of a common makes coney-burrows in the common, and stores them with conies, by which the commoners cannot have sufficient common, yet the commoners cannot justify the killing the conies, but ought to bring their assize or action against the lord, for they cannot be their own judges, dubitatur. Trin. 11 Baker. S. C. Jac. B. R. between * *Carrel* plaintiff, and *Park and Baker* defendants. Mich. 5 Jac. B. R. between † *Hodson and Griffel*, per opinion of the court seem'd curiam,

to incline for

the plaintiff, but that for a fault in the pleading discover'd by Houghton J. all was discontinued.

† Cro. J. 195. pl. 21. S. C. adjudg'd.—Yelv. 104, 105. S. C. the commoner in case of such charge may have action on the case.—Brownl 208. S. C. & S. P.

2 Bulst. 115. [3. **So although the sheep of the commoners are killed by falling into the said coney-burrows** so made by the lord, yet they cannot justify the digging of the land, and stopping them, for the cause aforesaid. Trin. 11 Jac. Carril v. Pack, seems to be the case intended & S. P. there adjudg'd for the plaintiff.—Brownl. 227. Carril v. Baker. S. C.—See the notes at plea 2.

[4. If *J. S.* hath land adjoining to the land of *J. D.* in which *J. N.* hath common of pasture, and *J. S.* makes coney-burrows in his land, and stores them with conies, which come into the land of *J. D.* *J. N.* who hath the common of pasture, cannot there kill the conies; because he hath nothing to do there but take the grafs with the mouth of his cattle. Mich. 43, 44 Eliz. B. R. between * *Bellowe and Loughdon*, adjudged. Mich. 10 Car. B. R. between † *Everfley and Winkinson* adjudged. [But] such a commoner brought an action upon the case against *J. S.* who without any lawful grant or prescription, had stored the land adjoining with conies, by which the conies came into the land where he had common, per quod he lost his common, and adjudged that the action does not lie, and a judgment given in banco reversed accordingly in this case in a writ of error, and the court gave the reason, because the commoner may kill the conies. Intratur. Hill. 8 Car. B. R. Rot. 302.]

Accordingly.—S. C. cited Cro. J. pl. 21.—S. C. cited Yelv. 105.—2 Bulst. 116. S. C. cited Brownl. 208. cites S. C.

† Jo. 356 pl. 5. *Hirdley v. Wilkinfon*. S. C. adjudg'd for the commoner in C. B. but that judgment was reversed in B. R.—Cro. C. 387. pl. 20. S. C. says the case in C. B. passed sub silentio, and the judgment there was reversed in C. B.—See Tit. Actions. (N. b.) pl. 9. S. C. and the notes there.

[5. A commoner may justify the taking of the cattle of a stranger damage feasant upon the common, is his own name, for the interest which he has in the common. * 15 H. 7. 2. b. 12, 13. b. per curiam. 14 H. 7. 3. b. Co. 9. *Mary's Case*, 112. b. F. N. B. 128. (C.) 10 E. 4. 4. 13 H. 7. 15. b. agreed.]

7. 13. S. P. but he shall not have action of trespass, nor shall any other have such action but the possessor of the soil.—9 Rep. 112. b. resolved, and the court said it is evident that he may take the beasts of a stranger damage feasant, and cites it as so held in 24 E. 3. 42. a. 46 E. 3. 23. b. 15 H. 7. 2. a. b. & 12. b.—S. P. admitted by Coke Ch. J. 2 Brownl. 148, 149.—S. P. per cur. Yelv. 104. in case of *Hoddesdon v. Gresil*.—Yelv. 130. S. P.—2 Bulst. 117. S. P.—S. P. agreed Arg. Bridgm. 10.—Godb. 123. Arg. S. P. cites 15 H. 7.—Adjudg'd that if the cattle of a stranger escapes into the common, the commoner may distrain them damage feasant as well as when they are put into the common. Godb. 185. pl. 265. Hill. 9 Jac. C. B. *Morris's case*.—9 Rep. 112. a. in *Mary's case*. S. C. resolv'd accordingly.

[35]

[6. If there be a custom that a close ought to lie fresh and hained every second year, till Lady-day, after the corn cut and carried away, and *J. S.* hath used time out of mind to have common in the said close after Lady-day, till it is sowed again with corn, for his cattle levant and couchant upon a certain tenement, as appurtenant thereto, in this case, if the lord of the soil of the said close puts in his cattle in the said close, against the custom, when it ought to lie fresh and hained by the custom, the said *J. S.* though he but a commoner, yet may take the cattle of the lord there damage feasant, and (*) justify it in an action of trespass brought against him by the lord of the close where he took the cattle, for the common will be the worse if the lord may eat the grafs before the common is to be taken by the custom. Mich. 14 Car. between *Trulock and White*, adjudged, this being moved in arrest of judgment. Intratur. Trin. 14 Car. Rot. 1212. B. R.]

tenement, plaintiff then can put in 3 horses only, and because the plaintiff put in more, the defendant as the commoner took them damage feasant. Fenner, Williams, and Cooke held such taking damage

mage feafant good; for by the cuftom the lord is tied up to his ftint, and the commoners have no other remedy but by diffraining; and the cuftom here has made the lord as mere a ftanger as any other perfon; but the Ch. J. and Yelverton doubted thereof, and thought the defendant fhould likewife have alledged a cuftom and uſage alfo to diffrain the beaſts of the lord, and then it had been good, Yelv. 129. Trin. 6 Jac. B. R. Kenrick v. Pargiter.—Cro. Ja. 208. pl. 1. Kenrick v. Pargiter. S. C. the court divided 2 and 2, and Crook does not mention himſelf.—Brownl. 187. S. C. ſeems a tranſlation of Yelverton.—Noy 130. S. C. the cuftom to ftint the lord was adjudg'd good; but it ſeem'd that the cuftom to diffrain the cattle of the lord ſhould be alledged.—Cro. J. 257. In pl. 15. S. C. cited per cur, as reſolved that one man may preſcribe to have the ſole paſture in ſuch a place from ſuch a time to ſuch a time, exclusive of the owner of the ſoil.

It was agreed that if the lord of the waſte does furcharge the common, the commoner cannot drive his cattle off the common, or diffrain them damage-feafant, as he may the cattle of a ftanger, but the remedy againſt that lord is either an aſſiſe or an action on the caſe. Godb. 182. pl. 258. Mich. 9 Jac. C. B. Anon.

[7. A commoner in an action of treſpaſs cannot juſtify his coming there with an intent to put in his cattle there, if he does not put them in. P. 17 Jac. B. between Sir Henry Spilman and Hermitage, adjudged.]

[8. But the commoner may juſtify his coming to ſee if the paſture in it to be fit to receive his cattle. P. 17 Jac. B.]

S. P. by Popham, and judgment accordingly.

[9. If I have common of eſtovers in the woods of J. S. and J. S. cites part, or all of the wood, yet I cannot take any part of this which is cut, but ſhall be put to my aſſiſe or caſe, as my eſtate is, P. 17 Jac. B. between Sir Henry Spilman and Hermitage, per curiam.]

Cro. E. 820. pl. 14. Paſch.

43 Eliz. B. R. Baſſet v. Maynard.—S. P. reſolved. 5 Rep. 25. a. Paſch. 43 Eliz. B. R. Sir Tho. Palmer's caſe. S. C.—Mo. 691. pl. 955. S. C. adjudg'd in B. R. and affirmed in the Exchequer-Chamber.—S. C. cited Yelv. 188. per cur.—S. C. cited Brownl. 220.—If a man has common of eſtovers in the wood of another in fee, or for life, and the owner of the wood or any other cuts down all the wood, he who ought to have the eſtovers ſhall have aſſiſe, for it is a diſſeiſin of his common, cites F. N. B. 58. 159 and if he has only a term in the eſtovers, he ſhall have action upon his caſe; per cur. 9 Rep. 112 b. Trin. 10 Jac. in Mary's caſe.—An action will lie againſt the lord for cutting down the body of a tree when the tenant ſhould have the loppings. Brownl. 197.

* Br. common, pl. 49. (48) cites S. C. that this point was demurred and

[10. If a common every year in a flood is ſurrounded with water, yet the commoner cannot make a trench in the ſoil to avoid the water, becauſe he has nothing to do with the ſoil, but only to take the graſs with the mouth of his cattle. * 12 H. 8, 2. 13 H. 8, 15. D. 36 H. 8. 36. b. 39.]

not adjudg'd.—2 Bulſt. 116. Arg. cites 13 H. 8. S. P. that the court was divided 2 againſt 2, ſo that a commoner may reform what is amiſſe, and to the prejudice of the common, but not to meddle with the ſoil de novo.—Godb. 52. pl. 65, cites 12 & 13 H. 8. that a commoner cannot meddle with the ſoil.—But tho' he cannot meddle with the ſoil, as digging a trench, yet if he amends and repairs a thing abuſed it is no treſpaſs, and therefore if the land be full of mole hills, he may dig them down; Arg. Brownl. 228. cites 13 H. 8. and 42 Aff. if the lord makes a hedge the commoners may pull it down; ſo if the lord makes a pond in the land, the commoner may dig and let the water out. And ſo if holes were dug in the common long ago in damage and hurt of the land, the commoner may put the earth, ſo dug out, into the holes again.—He cannot make a fence or ditch to let out the water, which ſpoils the common. Arg. Bridgm. 10. Trin. 19 Jac.—But in ſuch caſe he may juſtify, by ſaying that the commoners, time out of mind, have uſed to dig the land to let out the water, that he may the better take his common with his cattle. Godb. 182. pl. 258. Mich. 9. Jac. C. B. held per tot. Cut. Anon.—Sid. 251. pl. 20. Paſch. 17 Car. 2. is added a quere to this purpoſe, and ſays, it is ſo uſed in the moors in Somerſetſhire. The caſe was, the lord brought treſpaſs againſt a commoner for filling up a trench in the common dug by the lord, and the court held, that the action lies; for a commoner cannot cut mole-hills nor buſhes in the common, nor make fiſh-ponds, as has been adjudg'd, though they are acts of improvement. Howard v. Spencer.

* [36]

11. He who is diſſeiſed of the land to which common is appendant, cannot uſe the common before that he has recovered the land to which &c.

&c. for the common shall not be doubly pester'd. Br. Common, pl. 34. cites 19 H. 6. 33.

12. In trespass, by three justices where a man has 20 loads of wood yearly to be cut in N, 10 to burn, and 10 to repair pales, and to make new pales, he may take for reparation or to make pales, though his pales need no reparation; because he may reserve them to season them, and then make pales thereof; and *e contra* of Houseboot and Hayboot; for this shall be intended where it wants reparation. Br. Common, pl. 32. cites 10 E. 4. 3.

13. But if he puts any of them to another use, trespass lies. Br. Common, pl. 32. cites 10 E. 4. 3.

14. Where I have common in another's land, and the owner makes a hedge in the land where the common is, I may break all the hedge. Br. Common, pl. 9. cites 15 H. 7. 10.

So of common appendant &c. and the tenant of the soil where the common is, makes a hedge in the land where the common is, I may break all the hedge, and yet he may approve or inclose a certain parcel well enough. Br. common, pl. 15. cites 21 H. 7.

15. But if he incloses all the land in which the common is, by making of the hedge in other land which invirons the land in which the common is, I cannot break all the hedge, but only parcel, to have a way to the land where the common is; and this is the diversity; per cur. Br. Common, pl. 9. cites 15 H. 7. 10.

16. If all the inhabitants of a town prescribe to have common in such a field after harvest, and one particular man, who has freehold land within the said field sowed, will not within convenient time gather in his corn, but suffer the same to continue there on purpose to bar the inhabitants of their common, the inhabitants may put in their cattle, and if they eat his corn, he has no remedy. Arg. 2 Le. 202, 203. pl. 254. Mich. 29 Eliz. B. R. cites 21 H. 6.

17. In trespass quare clausum fregit, & solum fodit; the defendant justifies, that he and his ancestors, and all whose estate he had in a cottage, have used to have common of turbary, to dig and sell ad libitum, as belonging to the house, &c. and adjudged that 'tis an ill plea; for such a common as abovesaid is an interest and a Franktenement. See 7 Affise 4, and is repugnant in itself; for a common appertaining to a house, ought to be spent in the house, and not sold abroad; and judgment accordingly. Noy 145. Valentine v. Penny.

18. In trespass by the lord, the defendant justified the taking the cattle damage feasant, setting forth a custom, that the plaintiff, who was lord of the manor, had the sole right to the place where &c. entirely to himself, until Lammas-day, but that afterwards it was common to the tenants, so as the plaintiff could put in three horses, and no more; and because after Lammas-day, &c. he put in more, the defendant took them damage feasant. This custom was found for the defendant. It was mov'd, that defendant being only a commoner, could not take the cattle, and the place where, &c. is the soil of the plaintiff, so as his cattle cannot be damage feasant on his own soil. Two justices held the taking good, because the lord is to be excluded by custom for all but his tint, and the commoners have no other remedy to preserve their right; but two other judges doubted, because the

Noy 130. S. C. adjudg'd, that the custom is good; but it seem'd that he ought to allege the cust. tom also to distrain the cattle of the owners of the same land.—Yelv. 129.

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Kinrick v. Pargiter, S. C. says, that 3 justices, viz. Fenner, Williams, and Crook, held the taking the lord's beasts damage feasant to be good, for the reasons given in Cro. J. and that the custom here has made the lord as mere a stranger as any other person, and no doubt but the commoner may take a stranger's beasts damage feasant; but the Chief Justice and Yelverton doubted, and that they ought to have alledged a custom to distrain the lord's beasts, and then it had been good; Quod Nota—Brownl. 187. S. C. in totidem verbis.—a Brownl. 60. S. C. says, that judgment was given for the plaintiff by all the justices upon the pleadings, and they moved the parties to plead.

Brownl. 220 S. C. but seems only a translation of Yelv. —Cro. J. 271. pl. 4. S. C. accordingly. 19. If a grant be made to J. S. of common, and after the said grant the grantor erects a stack of corn there, the grantee may put in his cattle, to use his common, and may use the whole place for his common, and eat the hay. Resolv'd. But for want of shewing the indenture of grant, which is the ground of his title, judgment was given against him. Yelv. 201. Hill. 8 Jac. B. R. Farmer v. Hunt.

Yelv. 187. Dewclas v. Kendall, S. C. accordingly.—Brownl. 219. S. C. but seems only a translation of Yelv.—3 Bulst. 93. S. C. accordingly. 20. Trespas for carrying away 30 load of thorns in a place called the common waste, the defendant justifies for that he was seised of a messuage and 3 acres of land, and that he and all those, &c. have used to cut down omnes spinas crescentes upon the said place, to spend in their houses, or about the said lands, as pertaining to the said house and lands; the plaintiff replied that R. S. was seised in fee of the manor of C. whereof, &c. and granted licence to him to take the thorns, whereupon he cut them down, and the defendant afterwards took them. It was held that the lord may not cut down any thorns, nor licence any other to cut them, for that his prescription excludes the lord; but if the defendant had claimed common of estovers only, then if the lord had first cut down the thorns, the commoner might not take them, wherefore it was adjudged for the defendant. Cro. J. 256. pl. 15. Mich. 8 Jac. B. R. Dowglas v. Kendal.

Yelv. 185. S. C. and Br wnl. seems to be only a translation. 21. A man had common for his cattle levant and couchant upon his lands in a field called B. when it was not sowed with corn, and he put in his cattle when part of it was sow'd; the court held that sowing parcel of the field should not hinder him from using his common in the residue, because part of the field might be sowed by Covin, on purpose to hinder the commoner from taking his common. Brownl. 189. Mich. 8 Jac. Truelock v. Rigby.

22. A commoner cannot generally justify the cutting and carrying away bushes from the common, but by a special prescription he may justify the same; per tot Cur. Godb. 182. pl. 258. Mich. 9 Jac. C. B. Anon.

Cro. E. 463. (bis) S. C. & S. P. by Popham, that by such grant within my manor of D. I shall have it within my own demesnes only; for if otherwise, the queen should impose a charge upon another person, which the law will not suffer. 23. The king cannot grant free warran to the prejudice of a commoner. 2 Jo. 5. Arg. & admitted. Trin. 21 Car. 2. C. B. in case of Timberley v. How. cites 3 Cro. 462. Higham v. Best; and said that the grant cannot enable the grantee to erect an house.

[38] 24. Commoner may abate hedges made on his common, for that is not a meddling with the soil, but only a pulling down the erection. 2 Mod. 65. Hill. 27 & 28. Car. 2. C. B. Mason v. Caesar.

25. The

25. The lord or commoner may drive the beasts of a commoner mix'd with the beasts of a stranger to a convenient place to sever them, and may drive the beasts of the stranger out of the common without any custom. 3 Lev. 40. Hill. 33 Car. 2. C. B. Thomas v. Nichols.

But commoner cannot drive the beasts of the lord off the common, or distrein them

damage feasant, as he may the cattle of a stranger. But the remedy against the lord is either an assize or an action upon the case. Godb. 182. pl. 258. Mich. 9 Jac. C. B. Anon.

26. Trespass for burning turfs defendant justifies that the turfs were on the land where he has common (and shews title to it) and for damage feasant he burnt the turfs. Adjudg'd on demurrer that defendant can't burn the turfs for this cause. 2 Jo. 193. Pasch. 34 Car. 2. B. R. Bromhall v. Norton.

27. A. has right of common in such a close, which belongs to B. who after the corn taken away sows pease in it; he cannot by such a trick deprive A. of the benefit of his common. Per cur. 12 Mod. 648. Trin. 6 W. and M. Anon.

28. If a stranger who had no right of common put in cattle, any commoner might distrain. Freem. Rep. 273. pl. 300. Pasch. 1698. Dixon v. James,

(B) Actions. By and against Commoners.

1. The Hel. Dig. 67. Lib. 8. cap. 5. S. 14 says, that in Bracton, 235. there is a writ of entry of sur disseisin of common of pasture, and of other things.

2. The clear opinion of the court was, that a man shall not have writ of entry in nature of assise of common of pasture. The Hel. Dig. 67. Lib. 8. cap. 5. S. 15. cites 12 E. 2. Dower 161. and that so was the opinion of Fitzh. Pasch. 27 H. 8. 12. that no præcipe quod reddat lies of common of pasture; but Shelley held that it lies against a porman &c. As to plaint of common in assise, see in assise, plaint, & quod permittat in Fitzh.

3. Note that a commoner shall not have an action of trespass for trespass which a stranger does in the soil, for he is not seised of the soil. Br. trespass, pl. 233. cites 22 Aff. 48.

Br. common pl. 24 cites S. C.—and Bridgm. 10. cites S. C.

& 11 H. 8. 2.—Br. common, pl. 40. [39.] S. P. cites 15 H. 7. 13.—Ibid. pl. 36. [35.] cites S. C. & 5 H. 7. 2. & 44 E. 3. 42.—Ibid. pl. 40. [39.] S. P. cites 15 H. 7. 13.

4. He may avow for damage feasant. Ibid. cites 24 E. 3. 42.

5. If I have a common upon another man's land, and the tertenant ploughs the land, I shall have assise of common. Per Markham. Br. assise, pl. 42. cites 2 H. 4. 11.

If the tertenant ploughs the lands in which I

have common of pasture, I may have action on the case in nature of a quod permittat. Arg. Godb. 24. cites 2 H. 7. and 4 E. 4.

6. Note, by the statute W. 2. cap. 25. Assise lies of common and other profits apprende, but not of a way; and per Scot, for disturbing of a way to my common, assise lies of the common. Br. common, pl. 33. cites 11 H. 4. 25. 26.

If lord apprends of the waste where I have common, and does

does not leave me any way, by which I am compell'd to go all round about, I shall have *affise* of the common. Br. Nufance, pl. 9. cites 11 H. 4. 25.

[39] 7. Note, per tot. Cur. except Ashton, that *præcipe quod reddat* does not lie of common, but *quod permittat*. Br. common, pl. 45, cites 4 E. 4. 1, 2.

8. *Præcipe quod reddat* of common for 2 cows does not lie; but *præcipe quod reddat* of *pasture* for 2 cows lies well by him; but the other justices held it all one, and that *præcipe quod reddat* does not lie. Ibid.

9. If a man be *disceised* of the common appendant or appurtenant to his land, and afterwards makes a *feoffment* of the land to which the common is appendant or appurtenant, he shall not have *affise* of that common, nor other remedy. F. N. B. 180. (F).

The tenant may either have *affise*, 10. If the lord *surcharges* the common, the tenant shall have an *affise* of common against him. F. N. B. 125. (D).

or an action upon the case. Godb. 182. pl. 182. pl. 158. Mich. 8 Jac. C. B. Anon.

11. If the lord makes *approvement*, and leaves not sufficient common to the tenant, the tenant shall have *affise*, and not a writ of *admeasurement*. F. N. B. 125. (E).

12. If the tenant of the freehold *plough* and *sow* the land, the commoner may put in his cattle and eat the corn, because the wrong first began by the tenant. Arg. Godb. 124. pl. 144. Hill. 29 Eliz.

13. If *clay* be dug by a stranger, and if *grafs* cut, the commoner can't carry it away nor have trespass. Cro. E. 434. pl. 46. Mich. 37 & 38 Eliz. B. R. Stile v. Butts.

Mo. 411.

pl. 561.

S. C.—But

if the stran-

ger digs and carries it away, *action* on the case lies for the commoner, as well for the digging and

laying it on the common and so spoiling the *grafs*, as for the carrying it away, and every one of these

injuries increases the damage. Godb. 343. Trin. 21 Jac. B. R. Bullen v. Sheene.—2 Roll Rep.

608. S. C.—Palm. 366. Sheene v. Bullen, S. C.

Cro. E. 845.

pl. 32. Cant-

trell v. Carch

S. C. 43

Eliz. in Cam.

Scacc.—See Tit. Nufance (H) pl. 30. S. C. in the notes there.

14. He may have action of the case for *stopping his way to the common*, tho' he might have had an *affise*; affirmed in error. Noy 37. Hill. 42 Eliz. B. R. Cautwell v. Church.

15. *Coney-burroughs* erected in time of the father, and continued, is a wrong to the heir. Yelv. 143. Mich. 6 Jac. B. R. Gresil v. Hoddefon.

16. A commoner cannot generally justify the *cutting and taking bushes* off from the common; but by a special prescription he may justify the same. Per tot. cur. Godb. 182. pl. 258. Mich. 9 Jac. C. B.

9 Rep. 113.

a. Trin. 30.

Jac. S. P. in

Mary's case,

S. C.

17. An action does not lie for a commoner, unless it be for a *damage, whereby he loses his common*. Brownl. 197. in the case of Crogate v. Morris.

Hob. 43.

Hobart Ch.

J. cites 9

Rep. 113.

Mary's case,

18. If a stranger comes and eats the common, a freeholder may bring an *affise* of common, because it is a *disseisin*; for a *disseisin* of common is the taking away the profits of the common. Brownl. 197. in case of Crogate v. Morris.

S. C.

S. C. that if any man feed in a common wrongfully, every commoner may have an action of the case against him; and by the same reason, if the lord of the soil plough it up, or make a water of it, every freeholder may have an assise, and every copyholder an action of the case, and yet at this time there was no profit of common at all, and the possibility of restoring of it less than in this case; and therefore there can be no reviving the very title which must be for the inheritance, or not at all.

19. Commoner shan't have *assise* or *action sur case* for every petit feeding thereon by the beasts of a stranger; but the depasturing ought to be such, *per quod communiam* for his beasts habere non potuit, sed *proficuum suum inde per totum idem tempus amisit*; so that if the *trespass* be so small that he has no loss, but sufficient in ample manner remains for him, the commoner shan't take them damage feasant, nor have any action for it, but the tenant of the soil, or the lord, may in such case have action. 9 Rep. 113. Trin. 10 Jac. Robert Mary's case. Brownl. 197.
Crogate v.
Morris, S.C.
— a Brownl.
148. S.C.—
The ancient
opinion was
that a com-
moner might
distrain for
damage fea-
sant, but not
maintain

trespass, for two reasons, 1st, Because of the multiplicity of actions, if every commoner might bring action. 2dly, That the commoner had nothing to do with the common, but to take the herbage of it by the mouths of his cattle, and has no other interest in the freehold, and can't enter into the common but for this end, and only the lord of the common shall have an action, *quare clausum fregit*, against any one who commits a trespass there and has not common. This ancient opinion has alter'd of late times; the reason is, the commoner is deprived of his interest and profit by another's wrong doing; the cattle which depasture the common may be removed before a distress can be taken; perhaps all the profits of the common may be destroy'd and not a distress to be found; a very powerful man may deprive a commoner of all his common, if he be not allowed to bring an action for it. Jenk. 144. pl. 99.

20. If he be utterly disturbed of his common, he may have an *assise*, or a *quod permittat*. Bridgm. 10. Arg. Trin. 19 Jac. Where a
man has
common of
pasture for his cattle, and is disturbed by a stranger that he cannot use his common, he may have
quod permittat, and it may be sued by justices in the county or in the common pleas. F. N. B. 123. (F).

21. If any damage or annoyance be made upon the land, whereby he loses his common, he may have an *assise*. Arg. Bridm. 10 Trin. 19 Jac. Br. Tres-
pass, pl. 233
cites 22.
Ass. 42.

22. Per Doderidge, if warren be surcharged commoner shall have action, and if common be surcharged the lord of the warren shall have action. Palm. 319. Mich. 20 Jac. B. R. in case of Griefly v. Lee and Taylor.

23. In case for surcharging the common and treading the grass, after verdict exception was taken, that case lay not but *assise*; but Roll Ch. J. held, that he might have the one or the other at his election, tho' here be a disturbance of the plaintiff's freehold, notwithstanding the old books say the contrary; judgment for the plaintiff nisi. Sty. 164. Mich. 1649. Ayre v. Pyncomb.

24. In case by a commoner for digging pits and spreading gravel, whereby he lost his common, the defendant pleaded, that he is lord of the soil, and that he dug for coals, doing as little damage to the pasture as possible, and averr'd that he left sufficient common. Plaintiff demurr'd, for that the plea amounted to the general issue, and of that opinion was the court. Sid. 106. pl. 17. Hill. 14 and 15 Car. 2. B. R. Geo. v. Cother. Keb. 453.
454. pl. 47.
Coo v. Car-
thern S. C.
accordingly;
but by agree-
ment a full
issue was
offered to try

the right — Windham J. said, that the lord cannot dig pits in the common, into which perhaps the commoner's beasts may fall; for the statute intends other manner of improvement, viz. by inclosure.

25. *Ejectment* was brought of 10 acres of land, and common of pasture, after verdict and judgment, it was mov'd in error brought, that ejectment does not lie of common of pasture, tho' an assise does; but it was answer'd, that tho' an ejectment will not lie for common by itself, yet when it is *joined with land in ejectment it shall be intended appurtenant* to the land; to which the court inclin'd. Adjournatur. Freem. Rep. 447. pl. 608. Hill. 1676. Anon.

26. In an action sur case by commoner for eating his grafs with sheep, costs were allowed. 2 Mod. 141. Mich. 28 Car. 2. C. B. Stileman v. Patrick.

27. One commoner may have an action of the case against another that puts in more beasts than were levant and couchant, and the lord S. C. it was moved in arrest of judgment, that the issue was immaterial, because one commoner cannot distrain the beasts of any other commoner, tho' he may those of a mere stranger that has no pretence of right, and cited several books, and thereupon rule was made to arrest judgment, nisi &c. And the matter was afterwards debated by counsel of both sides, and the rule was not then discharg'd, nec adhuc est, as the reporter says he believes. But the reporter says it seems to him, admitting that a distress may be taken for a surcharge by a commoner, where the common is for a certain number, that it is reasonable that it might be done in this case; for altho' it is now uncertain as to the number, viz. how many shall be levant and couchant upon an estate, that must be ascertained by the jury upon a trial; & id certum est quod certum reddi potest. Freem. Rep. 273. pl. 300. Pasch. 1698. Dixon v. James.

other commoner, tho' he may those of a mere stranger that has no pretence of right, and cited several books, and thereupon rule was made to arrest judgment, nisi &c. And the matter was afterwards debated by counsel of both sides, and the rule was not then discharg'd, nec adhuc est, as the reporter says he believes. But the reporter says it seems to him, admitting that a distress may be taken for a surcharge by a commoner, where the common is for a certain number, that it is reasonable that it might be done in this case; for altho' it is now uncertain as to the number, viz. how many shall be levant and couchant upon an estate, that must be ascertained by the jury upon a trial; & id certum est quod certum reddi potest. Freem. Rep. 273. 274. pl. 300. Pasch. 1698. in case of Dixon v. James.

* [41]

For more of commoner in general, see common, copyhold, and other proper titles.

Fol. 407.

Conditions.

(A) To what Persons it may be reserved.

Hill. 2 & 3 [1.] If tenant for life, and the reversioner join in a feoffment, the P. & M. in condition may be reserved to the lessee only, and by his re-entry case of Warren v. Lee. he shall divest but his estate. D. 3. Ma. 127. 25.

—If two make a lease or gift upon condition, that if the lessee or donee does not do such an act, then the one of the donors or lessors shall enter; if the condition be broken, one of them shall only enter into one moiety, because he did not depart from more than a moiety, and the words cannot make a condition, but only to him that spoke them, and he spoke the words for the moiety only as the law says, and the other for the other moiety, and his speaking them cannot make his companion to enter or to avoid that estate. Pl. C. 133. n. Arg.

2. No entry or re-entry (which is all one) can be given or reserved to any person, but *only to the feoffor, donor, or lessor, or their heirs.* Litt. S. 347.

3. If I enfeoff another of an acre of land on condition that *if my heir pay to the feoffee &c. 20 s. that he and his heir shall re-enter*, this is a good condition; and if after my death my heir pays the 20 s. he shall re-enter; for he is privy in blood, and enjoys the land as heir to me. Co. Litt. 214. b.

S.P. and the heir was disinherited by the feoffment, and this is a particular exception in favour of the heir out of the general rule. Hawk. Co. Litt. 298. a note of the serjeant's.

4. A. had *bad issue two sons, B. and C.* and made a gift in tail to B. the remainder in fee to C. on condition, that B. shall not make any discontinuance with warranty to bar the remainder, and if he does that C. and his heirs shall re-enter. B. made a feoffment in fee with warranty; A. dies; B. dies without issue; C. may enter; but had the discontinuance been after A.'s death, C. could not have entered. In this case, 1st. the entry for breach is given to A. and not to C. 2dly, by the death of A. the condition descends to B. and is only suspended, and is revived by the death of B. without issue, and descends to C. 3dly, the feoffment made in A.'s life cannot give away a condition that is collateral, as it may do a right. 4thly, a warranty cannot bind a title of entry for a condition broken; but had the discontinuance been made after A.'s death, it had extinguished the condition. Co. Litt. 379. a. b.

Hawk. Co. Litt. 478, observes that B.'s feoffment with warranty in A.'s life-time cannot bar C. of his entry by force of the condition, which depending on the original deed, binds the state of the land into

whose hands forever it comes, and can't be devised or barr'd by a warranty; yet if B. disseises A. and makes a feoffment with warranty and dies, he bars C. because A.'s estate in the land being devised and turn'd to a right. was consequently capable of being barr'd by a warranty. And by a discontinuance by B. after A.'s death, the condition is extinguished; because it was in him as heir to his father at the time of the feoffment, and was as much released by it as if he had expressly released it by deed.

* [42]

5. A condition is only such as may be performed by the party himself, from whom it moves or his heirs, and not where a thing is to be performed by a 3d person; per master of the rolls. Ch. Prec. 488. Pasch. 1718. In case of Marks v. Marks.

(A. 2) Notes as to Conditions.

1. A Condition annexed to the realty in the legal understanding is a quality annexed by him, that has estate, interest, or right to the same, whereby an estate &c. may either be defeated, or enlarged, or created upon an uncertain event. Co. Litt. 201. a.

2. Of conditions in deed some are affirmative, some are negative, and some in the affirmative which imply a negative; some making the estate whereunto they are annexed, voidable by entry or claim, or void ipso facto without entry or claim; some are annexed to the rent reserved out of the land, and some to collateral acts &c. some are single, some in the conjunctive, and some in the disjunctive. Co. Litt. 201. a. 201. b.

3. There are 6 several kinds of conditions; 1st, a simple condition in deed. 2dly, of a condition subsequent to the estate. 3dly, a condition annexed

Conditions.

annexed to the rent, &c. 4thly, a condition that *defeats the estate*, 5thly, a condition that *defeats not the estate before an entry*. And lastly, a condition *in the affirmative which implies a negative*, (as behind or unpaid implies a negative) viz. not paid. Co. Litt. 201. b.

4. Conditions are divided into conditions *in deed* and conditions *in law*; condition *in deed* is as if a man infeoffs another in fee by deed indented, reserving to him and his heirs yearly a certain rent payable at certain days, upon condition that if the rent be behind, &c. the feoffor and his heirs may re-enter. Litt. S. 325.

5. A condition *in law* is that which the law implies without express words in the deed; as if one grants the parkership of his park for life, a condition is implied, that if he does not what belongs to his office to do, the grantor and his heirs may oust him; and such condition is as strong as if it was put in writing. Litt. S. 371. & Co. Litt. 232. b. 333. a.

6. Formally condition ought to be the *words of the lessor*, but when they are *indefinite* and *apt to defeat the estate*, they shall be taken as condition; per Doderidge, and cites Browning v. Beston, which he says is received for law at this day. Palm. 503. Hill. 3 Car.

7. There are 3 things which *concern the nature* of a condition. 1st, *apt words*; 2dly, *the nature of them to restrain the estate*; 3dly, that they *give title of re-entry*, but the place where they are inserted [43] is not material; resolved. Palm. 503. Hill. 3 Car. B. R. in case of Hayward v. Fulcher.

8. Where the condition is *larger than the recital*, the recital shall restrain it. Per Hale Ch. J. 2 Saund. 414. Pasch. 24 Car. 2. in case of Arlington v. Merrick.

(B) When a person is not certainly designed, to whom the law shall say that it shall be.

* In case of Warren v. Lee, cites F. N. B. in ex gravi querela. [It is F. N. B. 201. (C) that he in remainder shall have advantage of the condition if it be broken; but the same shall be by way of action, and not by entry for the condition not performed.]

1. **A** Man devises to A. upon Condition, the remainder to B. in tail, *saving the fee*, and dies; the condition here is, by implication of law, reserved *to the heir*; for by intendment he shall have the condition who is prejudiced by the devise, who is the heir. (R. It is to be admitted, that the condition is not destroyed by the remainder.) * D. 3 M. 127. 53.

(C) Condition in Deed. What Words make a Condition. What not.

* Grant of the king ad effectum, that the grantee shall give it to A. B. is a conditional grant. B. Patents, pl. 29. cites 3 H. 6. 34. 35. — 3r. confirmation, pl. 13. S. P. per omnes justiciarios, cites S. C. — Quare impedit, king

1. **A** D effectum in grants of the king makes a condition. * 38 H. 6. 35. + Co. 10. Portington 42.

king H. 6. granted an advowson to W. N. and two others, *ad effectum*, that they give it to the nuns of *Sion*, of the foundation of the king; and the defendant pleaded, that the grantee granted it to the *abbess of Sion*, and did not say that she was of the foundation of the king; and therefore ill, by all the justices; for by them, this word (*effectum*) is a condition; but it is not declared, whether it be a condition in the case of the king only, or in the case of a common person alio. Br. Conditions, pl. 96. cites 38 H. 6. 34. — Ad effectum is conditional of itself. 4 Le. 70. in pl. 161. Arg. cites 38 H. 6. 34. in case of the king. — Such words in a grant of the king make a condition in futuro, and that stands with the grant, and allows it perfect and good at the first.

† D. 318. b. Marg. pl. 12. cites S. C. — Co. Litt. 204. a. S. P. — See pl. 5. in the notes.

[2. If the king grants an advowson in fee, and further *concessit*, Fitz. Condition, pl. 7. that the grantee may amortize this for the soul of the progenitors of the king; this is but a licence, and not a condition. 43 E. 3. 34. cites S. C. so that he is not bound to amortize but at his will.]

[3. The words *Ea intentione* in the grant of the king make a condition. Co. Litt. 10. Portington 42.]

Marg. cites S. C. — But in the case of a common person's grant of feoffment, the words *Ea intentione*, or *Ad Effectum*, do not make a condition, though in a last will they do. 10 Rep. 42. a. cites it as resolved Pasch. 18 Eliz. by all the justices of C. B.

[4. The words *Ad solvendum* in the grant of the king, make a condition. Co. 10 Portington 42.]

Litt. 204. a. S. P. — but contra in the case of a common person, unless it be in a last will. 10 Rep. 42. a. cites it as resolved Pasch. 18 Eliz. by all the justices.

[5. *Ea intentione* does not make a condition, but a confidence and trust, unless an express re-entry be limited. *D. 3, 4. Ma. 138. 30. adjudged. Doctor and Student, 122. † 31 H. 8. S. 152. Contra † 27 H. 8. 15. b.]

S. P. held by several. — Br. N. C. pl. 152. cites S. C. — Br. Conditions, pl. 7. cites 27 H. 8. 14, 15. that Knightley held the words *Ea intentione* to make a condition as well as the words *sub Conditione*, &c. — If a man makes a feoffment *Ea intentione*, that the feoffee shall not do such an act, there are no words of condition in the case of a common person. Co. Litt. 204. a. says it was so adjudged 18 Eliz. in C. B. — 10 Rep. 42. in Mary Portington's case, cites S. P. so resolved by all the justices, 18 Eliz. C. B. — So a feoffment in fee *ad intentionem* to perform his will, this is no condition, but a declaration of the purpose and will of the feoffor, by several; and the heir cannot enter for non-performance. Br. Conditions, pl. 191. cites 31 H. 8. — *Quere* of these words, *Ad intentionem*, or *Proposuit*, if these make a condition? Brook says it seems that they do not. Br. Conditions, pl. 96. cites 38 H. 6. 34.

A man made a feoffment in fee sub conditione, *Ea intentione*, that his wife should have the land for her life, the remainder to his younger son in fee. The feoffee died without making such an estate. The heir of the feoffee entered. It was resolved, that it was not a condition, but an estate, which was executed presently according to the intent. 4 Le. 2. pl. 3. Mich. 23 Eliz. Anon.

‡ Br. Conditions. pl. 7. cites S. C. — S. C. cited Palm. 438.

[6. *Ut adveniat*, *ad inveniendum*, or *perimplendum*, &c. make not a condition. D. 3, 4. Ma. 138. 3. And this is also proved by the writ of cessavit de Cantaria.]

[7. Bracton capite de donationibus upon condition hath this verse.]

[8. Scito quod (ut) modus est (si) conditio (quia) causa. This is cited, D. 3, 4. Ma. 138. 31.]

[44]
The Countess of Surrey's case. — Br. Conditions, pl. 191. cites S. C. &c.

S. C. cited Co. Litt. 204. a.

If the grantee refuses to give his counsel, the annuity is extinct. **9.** If an annuity be granted to a physician *pro consilio impendendo*, this is a condition. 2 Le. 126. Arg. cites 41 E. 3. 6. for the grantor has no means to compel the grantee to give his advice. Br. Extinguishment, pl. 36. cites S. C.

But Brooke says, that it does not appear there whether it was *pro servitio impenso*, or *impendendo*. Ibid.—S. C. cited. Arg. 2 Le. 128.—S. C. cites Arg. 4. Le. 70. that he may enter into the wardship and land. **10.** If J. N. has the ward of land and body, and grants it to W. P. his servant, *pro bono servitio*, &c. this was admitted a good condition; and if he departs out of his service the other may enter into the ward. Br. Conditions, pl. 29. cites 45 E. 3. 8.

D. 329. a. pl. 13. Mich. 35 & 36 Eliz. Anon. S. C.—3 Le. 65. pl. 95. S. C. cited by Dyer.—Dal. 116. pl. 7. 16. Eliz. S. P. and seems to be S. C. **11.** A. and B. were bound to stand to the award of certain persons, who awarded that A. should pay unto B. 20 s. per ann. during 6 years, towards the education and bringing up of such a one an infant, and within the 2 first years of the said term the infant died, so as now there needed not any supply towards his education; yet it was adjudged that the yearly sum ought to be paid for the whole term after; for the words (towards his education) are but to shew the intent and consideration of the payment of that sum, and no words of condition, &c. 2 Le. 154. in pl. 186. 19 Eliz. C. B. Anon.

12. In some cases this word *pro* does not make a condition; As if before the Stat. of W. 3. land was given *pro Homagio suo*, there, if the homage be not done, the feoffor could not re-enter, but he ought to distrain. Arg. 2 Le. 128. Mich. 29 Eliz.

Co. Litt. 203. a. says, among which is *sub conditione*; as if A. enfeoffs B. to have to B. and his heirs, upon condition that B. and his heirs pay, &c. to the said A. annually such a rent, &c. the feoffee has estate upon condition. Litt. S. 328.

*14. Regularly the word (*pro*) does not import a condition, tho' it has the force of a condition when the thing granted is *executory*, and the consideration of the grant is a service, or some such thing, for which there is no remedy; but the stopping the thing granted, as in the case of an annuity granted *pro consilio*, or for executing the office of a steward of a court, or the service of a captain or keeper of a fort, here the failure of giving counsel, or performing the service, is a kind of eviction of that which is to be done for the annuity, the grantor having no means either to exact the counsel, or recompence for it, but by stopping the annuity; and in these cases the condition is not precedent, and therefore the performance thereof need not be averr'd when the annuity is demanded. Per Hobart, Ch. J. Hob. 41. Mich. 10 Jac. in the case of Cowper v. Andrews.

Cro. C. 475. pl. 4. Dodson v. Lynne. S. C. and because this concerned **15.** The clause is a dispensation to hold 2 benefices, *Dummodo* they be not above 12 miles from one another, does not make a condition to make the first void; Agreed among the justices without argument. Jo. 394. pl. 5. Trin. 13. Car. Dodson v. Glyn.

Eccelesiastical Jurisdiction, the court heard Civilians, and diverse texts in the civil law being shewn, that *modo* and *dummodo* are express provisors in such licences, and make no condition, unless added, that if he does otherwise then it shall be void; but is only an admonition or caution, that shall be punished

punished by ecclesiastical censures if he does otherwise; and this being always the exposition on granting such licences, the court resolv'd, that tho' it be generally a condition in the exposition of the law, yet to avoid the great inconveniences that would insue, as to avoidancies of multitudes of benefices, &c. it should not be taken here as a condition.

16. *Lease of land paying rent* is no condition; so a power to dig up trees making up the hedge again is not a condition, but *covenant* lies for not repairing the hedge. 2 Show. 202. pl. 209. Pasch. 34 Car. 2. B. R. Anon.

(D) By what Words it may be created. By *Covenant*.

[1.] IF a man leases land by indenture, and in this there is such a clause, *And it is covenanted between the parties, or It is agreed between the parties, That the lessee shall not do such a thing upon pain of forfeiture of the estate, * this is a good condition; for here the words stand indifferently to be the words of the lessee or lessor, and so shall be taken to be the words of the lessor.* H. 32 Eliz. B. R. agreed.] * Fol. 408.

[2. If a man by indenture leases for years, and therein the lessee covenants and grants with the lessor, that he nor his assigns *will not grant, assign, or sell the land to any præter, &c. upon pain of forfeiture of the term, this is a condition.* Mich. 12 Jac. B. R. and Trin. 14 Jac. B. R. between *Whitchcock and Fox*, adjudged.] Cro. J. 398. pl. 4. S. C. resolved without hearing arguments; for being by

indenture, they are the words of both parties, and sufficient to determine the lease.—2 Bulst. 290. *Fox v. Whichcocke*, S. C. Coke Ch. J. held it clearly a condition.—Roll Rep 68. pl. 12. S. C. & ibid. 69. agreed on the other side to be a condition.—S. P. by Mountague, and the lessor has election either to enter or to bring action of covenant. Dal. 8. pl. 7. Mich. 7 E. 6. Anon.

3. A *lessee for years covenants*, that if he, his executors or assigns, sell the term, that then the lessor may re-enter; This is no condition; for all conditions ought to be reserved and made on the part of the lessor, donor, &c. Dy. 6. a. b. pl. 1. 2. Pasch. 28 H. 8.

4. A. made a lease to B. wherein it was covenanted between the said parties, that if it happen the said rent to be behind, in part or in all, by the space of 6 weeks, that then it shall be lawful for A. to re-enter. Dyer held, that these words made condition, because they are the words of the lessor, as well as of the lessee. Weston was of the same opinion, viz. that it is a perfect covenant. Dal. 86, pl. 46. Anno 14 Eliz. *Molington v. Filpot*. [46]

5. A lease is made of a farm, except the wood, and the lessor covenants, that the lessee shall take all manner of underwoods, provided always, and the lessee covenants, that he will not cut any manner of timber-trees; this is no condition, being but a declaration of what wood he was to meddle with. Poph. 117, 119. cites 17 Eliz. *Hamington v. Pepul*.

6. Proviso added in the end of a covenant extends only to defeat the same covenant, unless there are the words *Quid tunc* the grant shall be void. But proviso put absolute in a deed, without dependence upon any particular covenant or exception, is to be construed But proviso annexed to an exception is only an explanation.

Mo. 106. for condition to all the estate. Agreed by all the justices. Mo. 106.
 Andrews's case. pl. 249. Mich. 17 and 18 Eliz. in Andrews's case.
 Cro. E. 202. 7. In an indenture of lease, the *lessee covenanted to perform all the*
 pl. 23. Arg. *covenants sub pœna forisfacturæ*, and by the opinion of the whole
 cites Hill v. court the same was a condition. Arg. Le. 246. pl. 331. cites 24
 Lockson Eliz. Hill v. Lockham.
 S. P. and seems to be
 S. C. that the lessor enter'd, and it was adjudg'd for him.

4 Le. 147. 8. The lord M. bargained and sold lands by deed inrolled, *pro-*
 pl. 258. *viso, and is covenanted, granted and agreed, that it shall be lawful*
 S. C. but *for J. S. (who was a stranger) to dig in the lands for mines*; it was
 states the grant to dig adjudged in this case, that, altho' the word proviso, absolute dicto
 to be to the lord M. his heirs and assigns, and that he assigned it
 velposito, makes a condition, yet when it is coupled with other
 words subsequent, it shall be construed in the sense of the said words
 to which it is coupled. Mo. 174. pl. 308. Mich. 26 & 27 Eliz.
 Huntington v. Mountjoy.
 over. But it was held accordingly, that the word (proviso) being coupled with other words of covenant
 and grant, did not create a condition, but should be of the same nature as other words of grant.—
 Godb. 17. pl. 24. S. C. in totidem verbis.

Le. 245. pl. 331. S. C. 9. The bishop of R. made a lease for years, *lessee covenanted, that*
 held accordingly by Wray and Gawdy, and Fenner did not contradict it.
he would not put out or disturb any of the tenants, inhabiting in the
said manor out of their tenancies, doing their duties according to the
custom of the manor; and plaintiff shewed, that the defendant had
put out one A. G. a tenant dwelling there upon a tenement parcel of
the said manor, and that the bishop enter'd for the condition broken,
and made a lease to the plaintiff. It was argued, that altho' the
words found in covenants, and are the words of the lessee, yet the
lease being by indenture, they are the words of both, and the intent
of them is to defeat the estate, which cannot be by covenant but by
condition; and Wray and Gawdy were of that opinion clearly.
 Cro. E. 202. pl. 33. Mich. 32 & 33 Eliz. B. R. Thomas v. Ward.

Goldb. 74. 10. A. leases to B. for years, with clause of re-entry for non-pay-
 pl. 1. S. C. ment of rent, and in the lease were diverse covenants on the part of
 all the court held, that the words (under like covenants) do not make a condition,
 tho' they are in a will, and Periam said, that they are void words.—Godb. 99. pl. 114. Mich. 28 and 29 Eliz. S. C. not resolv'd.—And
 197. pl. 232. Maunchell v. Dodington, S. C. adjudged.

[47] 11. J. S. made a lease for years; the *lessor covenanted that the*
lessee should have housebote, &c. without committing waste, upon pain
of forfeiture of the lease; if it be a covenant or a condition was not
resolved; but Walmsley held it a covenant on the lessor's part, and
consequently it cannot be a condition. Cro. E. 604. pl. 18. Hill.
 40 Eliz. B. R. arch-deacon v. Jennor,

12. If A. infeoffs B. viz. *proviso semper quod prædictus B. solvat seu solvi faciat præfato A. talem redditum; or ita quod prædictus B. solvat &c.* In those cases, without saying more, B. has only estate on condition; so that if he does not perform the condition, the feoffor and his heirs may enter. Litt. S. 329.

13. If a man by indenture lets lands for years, *provided always, and 'tis covenanted and agreed* between the said parties, that the lessee should not alien, and 'twas adjudg'd that this was a condition by force of the proviso, and a covenant by force of the other words. Co. Litt. 203. b.

also, per Popham. Cro. E. 486. cites Sir Henry Barkeley's case,

14. *Lease for 80 years of the manor of T. &c. excepting all woods and underwoods growing or to grow in the wood called T. wood, and excepting all timber trees of oak, ash, and elm, growing on any part of the premises, with free ingress and regress; the lessor covenanted that the premises were free from incumbrances, and the lessee covenanted to repair the fences, and also if he disturbed the lessor, or his assigns, to sell, cut or carry any of the wood or underwood excepted, that then it should be lawful for the lessor to re-enter &c.* One question was, whether this was a covenant or a condition, for which upon a disturbance the lessor might enter and defeat the estate? It was insisted, that it was not a condition, because they were the words only of the lessee, and every condition is created by the words of the lessor; 'tis true, if the words had been, if the lessee disturb &c. then the lease shall be void, this had been a condition, because the plaintiff could have no remedy by action upon a void lease; but 'tis otherwise where the lessee covenants it shall be lawful for the lessor to re-enter, because in such case he may have a remedy by way of action upon the deed; and Doderidge said that *formally a condition ought to be by the words of the lessor, but when they are indefinite, and proper to defeat the estate, they shall be taken as a condition*, according to Browning and Belton's case, which is received for law at this day. Palm. 491. 496. 503. Hill. 3 Car. B. R. Hayward v. Fulcher.

the words of the lessee himself, and tho' this point was not resolved in the case of the Queen v. Lyferr, yet the better opinion is so, and the law has been taken ever since that it shall be a condition. Ibid. 169. S. C. adjudged.

15. Lessee for years brought *trespass* for breaking his close, and beating down his hedges &c. The defendants *justify* for that one M. seized in fee, leased to the plaintiff, excepting the trees, with liberty to grub up, cut down, and carry them away, repairing the hedges and filling up the holes; and that M. granted the trees, and the liberty to the defendants &c. Upon demurrer exception was taken, because the defendant had not shown that he filled up the holes and repaired the hedges, and that those words (filling up the holes and repairing the hedges) make a condition, which not being done destroys the agreement, and avoids the liberty; sed non allocatur; for it is not a condition but a covenant, for breach whereof the lessee has remedy by action. Adjudged quod querens nil capiat, per Billam. 2 Jo. 205, 206. Pasch. 34 Car. 2. B. R. Warren v. Arthur.

(E) Improper Words.

* Br. N. C. [1.] If a man leases for life, or makes a feoffment upon condition
pl. 465. cites S. C. that it that if the *lessee does such an act*, the *estate shall be void*; tho'
is not void the estate cannot be void before entry, yet this is a good condition,
till an entry; and shall give an entry to the lessor by implication. * 2 Marl. Br. S.
per Bromley 465. Co. 3. *Pennant* 65. admitted. Litt. S. 723. M. 37, 38 Eliz.
Ch. J. B. R. in † *Goodale and Wiat's case*. Agreed by all præter Fenner,
Br. Conditions, pl. who doubted thereof.]
245. at the end of the plea cites S. C. † 5 Rep. 95. b. S. C. admitted to be a condition.—
Cro. E. 383, 384. pl. 4. S. C. affirmed in error, that they were good words of condition.—Poph.
99, 100. S. C. & S. P. admitted by two J. Gouldsb. 176. pl. 111. S. C. but the justices differed
as to its being a good condition.—Mo. 708. pl. 989. S. C. agreed, that the estate could not be
void before entry, but whether the words (shall be void) are sufficient warrant for entry they varied in
opinion.

[2. So it is if the condition be that the *estate shall cease*. Litt. S.
723. M. 37, 38 Eliz. B. R. per Coke.]

D. 193. pl. [3. If a man makes a feoffment by deed, upon condition that if
27. Mich. 2. the feoffee *does not* such an act, then the feoffment, charter, and
3 Eliz. livery *shall be void*; this is a good condition, *tho' no re-entry* be re-
S. C. & S. P. served. D. 9. 10 Eliz. 268. 15. admitted.]

[4. So if the condition be that the *feoffment shall be void*, this is a
good condition, and *shall give a re-entry* without an express refer-
vation. 11 H. 7. 22. *Eriche's case*, agreed.]

5 Rep. 95. [5. So if the condition be *that the deed of feoffment & seisin* inde
b. Goodal's *habita erit vacua & nullius vigoris*; this is a good condition; for this
case, S. C. is all one as if he had said that the feoffment shall be void; for the
& S. P. seems livery takes effect by the deed. Dubitatur, M. 37, 38 Eliz. B. R.
admitted. —Cro. E. between *Goodale and Wiat*, two against two justices.]

383. pl. 4. S. C. affirmed in error, that they were good words of condition.—Poph. 99. S. C. but S. P.
doubted by Popham and Fenner.—Mo. 708. pl. 989. S. C. agreed, that the estate could not be
void before entry; but whether the words (shall be void) are sufficient warrant for entry, they differed
in opinion.—Gouldsb. 176. pl. 111. S. C. but the justices differed as to its being a good condi-
tion.

See (K) pl. [6. If a man leases for life, or makes a feoffment in fee, upon
6. S. P. condition that if the feoffee or lessee *does such an act*, that then his
estate shall be void and cease, and the land *shall remain over to a*
stranger; tho' it was intended that the stranger should take advan-
tage of the condition, and he cannot by law, yet the lessor or
feoffor may enter by force of this condition. Lit. S. 723.]

This seems [7. If a man makes a feoffment by deed, and the *feoffee grants*
to be in- by another deed made upon condition, that *if the feoffor does such*
tended of an act, the *first deed shall be of no force*; this is a good condition,
another deed and shall give a re-entry, tho' none be reserved. * 30 Aff. 11 ad-
made at the mitted, 45 Aff. 10. admitted.]
same time.
—See (S)
pl. 2.

* The case was, a man made a *simple feoffment*, and after, by deed *rebeausing* it, the *feoffee granted*
to the feoffor, that if the feoffor paid 10 l. by such a day, that the deed and feoffment should be void.
Tanks said, that *defeasance* cannot be of effect of lands which pass by livery, if the livery be not made
as well upon the *defeasance* as upon the *charter* of feoffment; and the opinion of the court was with
him. Br. Conditions, pl. 113. cites 30 Aff. 11.—Br. *Defeasance*, pl. 8. cites S. C. and Brooke says,
that

that therefore at this day it is usual to covenant, that the assurance, after the condition performed, shall be to the use of the vendor, and that the vendee and his heirs, and all others, shall be [seised] to the vendor and his heirs.

[49]
[8. If a man leases for years, and in the indenture there is such clause, *et non licebit* to the lessee *dare*, vendere, vel concedere *statum & terminum suum* alicui personæ *sine licentia* of the lessor *sub pœna foris-facturæ termini præd'* this is a good condition. D. 66. a. pl. 8. Mich. 3 E. 6. per cur.]

Arg. Le. 246.—S. P. by Gawdy, Godb. 131.—Provided always, and it is covenanted and agreed, and the lessee covenants not to alien or grant over without licence of the lessor. The reporter adds a quære, if this be a condition or a covenant only, because it was not agreed among the justices. D. 157. pl. 7. Mich. 4 & 5 P. & M. Anon.—This amounts to a lease for years defeasible, and so it was adjudg'd in C. B. in Q. Elizabeth's time; and the reason of the court was, that a lease for years was but a contract which might begin by word, and by word may be dissolv'd. Co. Litt. 204. a. at the bottom.—Proviso quod non licebit to the lessee to alien his term without assent of the lessor, was resolved to be a condition. Cro. E. 60. pl. 2. Mich. 29 & 30 Eliz. B. R. Knight v. Mory.

[9. So if there be such a clause in the indenture, and the lessee *shall continually dwell* upon the house upon pain of forfeiture of the said term and interest. D. 6. [and] 7 E. 6. 79. pl. 46. per cur.]

[10. If a man makes a *feoffment rendering rent*, and if the rent be *behind*, that it shall be lawful for him and his heirs to *retake* the land, and to make his profit thereof; this is a good condition, and shall give a re-entry, tho' it be not expressly limited. 6. E. 2. Entry congeable 55. Adjudged.]

that terra redibit; and Coke Ch. J. said, that there ought to be a reasonable intendment in that case; that the word (return) is not a proper word, yet it is a good condition, and it was to defeat the estate.—If the words had been (to retake) only, without saying (to retake the land) it had been good; per Coke Ch. J. 3 Bull. 155. Mich. 13 Jac.—Co. Litt. 204. a. ad finem S. P. and cites S. C. and says, that for the avoiding a lease for years, such precise words of condition are not so strictly required as in a case of freehold and inheritance.

11. A. was bound in an obligation to B. and upon oyer of the obligation the endorsement was, that the said B. *vult & concedit*, that if the said A. should stand to the arbitrement of J. S. then the obligation should be void. It was moved that the condition is void, because it is, that B. vult & concedit, that if A. stands to the arbitrement of J. S. and all this is the deed of A. and not of B. neither is it by words conditional; and per Newton and Paston, the words vult & concedit are void, but the condition commences here, viz. if the said A. should stand to the arbitrement of J. S. And therefore it is sufficient to make a condition; whereupon the defendant's counsel passed over. Br. conditions, pl. 58. cites 21 H. 6. 51.

12. *Provided it shall not be lawful to the lessee to lop the trees*; per Dyer, 'tis a condition; per Brown 'tis not. Mo. 45. pl. 136. Mich. 5 Eliz.

(E. 2) By Words of Lessor only.

1. **A.** Leases to B. for years, with clause of re-entry for non-payment of rent, and in the lease were diverse covenants on the part of the lessee; afterwards *lessor devises that lessee should hold the*

dition; for the words (under like covenants) do not make a condition, tho' they are in a will. — 2 Le. 33. pl. 40. Hill. 29 Eliz. C. B. Machel, alias Michel v. Dunton. Ow. 54. S. C. re-

solved by all the justices accordingly; for covenants and conditions are of several natures, the one giving action, the other entry; and the intent of the will was, that the lessee* should not forfeit his term, tho' the covenants were not perform'd, but is only bound to such penalty as he was at first, which was to render damages in an action of covenant and judgment accordingly. — And. 179. pl. 214. Machel. v. Dounton, S. C. held accordingly. — Ibid. 197. pl. 332. Maunchel v. Dodington, S. C. agreed per Cur. that it does not make condition, but that the words were vain words. — Godb. 99. pl. 114. seems to be S. C. but not resolved, but says that Gawdy held it a condition, which was in a manner agreed by all the other justices; yet Periam and Rhodes J. said, that the first lease was not defeasable for non-performance of the covenants, nor was it the intent of the deviser that the second should be so, notwithstanding his meaning was that he should do the same things. — 2 Le. 33. pl. 40. S. C. and the whole court held that the words of the devise cannot make a condition; for a condition is a thing odious in law, which shall never be created without sufficient words. — And. 179. pl. 214. Manchell v. Dounton, S. C. & ibid. 197. pl. 232. Maunchel v. Dodington, agreed that it makes no condition. — Poph. 8. S. C. cited by Popham Ch. J. as adjudg'd no condition. — S. C. cited by Popham as adjudg'd accordingly. Cro. E. 288. in pl. 3.

* [50]

2. Covenant by lessor *that lessee may cut fireboot, &c. without doing waste*, and the lessee does waste in felling wood; this is a breach of lessee's agreement, and he is liable to be sued on his bond for performance of covenants, agreements, &c. for tho' 'tis the covenant of the lessor, yet 'tis the agreement of the lessee. Le. 324. pl. 457. Trin. 31 Eliz. C. B. Stevenson's case.

Fol. 409.

(F) Obligation. Condition. What Words make a Condition.

§cc (D) [1. IF the condition of an obligation be made in this manner, *scilicet*, the condition of this obligation is such, that *if R. H. do not grant over the benefice of D. during his life, then the said J. H. (the obligor) doth covenant to grant and assign the said advowson to the obligee and his assigns, &c.* tho' the word *covenant* be put in here, yet this is conditional, because it is expressed before in the commencement of the condition, [viz.] the condition of this obligation is such, &c. Tr. 38 Eliz. B. R. between *Wifden and Haynes*.]

[2. If the condition of an obligation be such, *now therefore if the said obligor pay 10 l. to the obligee quarterly, then it is agreed that the obligation shall be void*, this is a good condition. Per 8. Ja. B. between *Simpson and Bernard*. Per Cur.]

[3. If the condition of an obligation be to stand to the award of J. S. *so as the award be made in writing indented under his hand and seal, &c.* this is a condition so that the award shall not bind, tho' it be made by writing under the hand and seal of J. S. if the writing be not indented. P. 11 Car. B. R. between *Holmes and Hoyo* adjudged upon a demurrer. Intratur Hill. 11 Car. Rot. 468.]

Conditions.

50

4 The condition of an obligation was, *whereas the obligee is bound in certain obligations, the obligor is to deliver them to the obligee before Mich.* Resolved that this is a condition clearly. Mo. 395. pl. 515. Hill 37 Eliz. *Grammingham v. Ewre*

Cro. E. 356.
pl. 1. *Grammingham v. Ewer*, S. C.
— Ibid. —
339. S. C.

(G) Obligation. Condition. What shall be said [51]
to be *Parcel* of the Condition.

See Tit.
faits (G)

[1. IF the condition of an obligation be in such a manner; *whereas Robert Crofs the father shall and will before such a day, surrender the moiety of the said copyhold tenement unto Robert the younger, so that Robert the younger be thereof so seised, according to the custom of the manor, if they so long live, then the obligation to be void.* The last words (if they so long live) do not make the condition only, but the surrender is part of the condition also. M. 11 Jac. B. R. between *Marker and Crofs.*]

2 Bullst. 133.
S. C. the objection was to the word (whereas) instead of (if) and the court were all clear of opinion, that it was a

mere void condition, the same being altogether insensible, and not compulsory, as the same ought to be, and so the obligation is single and without condition. — The words were, *Whereas the obligee is bound in certain obligations, the obligor is to deliver them to the obligee before Mich.* &c. It was resolved, that those words make a condition clearly. Ibid.

[2. If the condition of an obligation be in such manner; the condition of this obligation is such, that *if the above-bounden A. B. do discharge the obligee of such a recognisance, &c. and whereas the above-bounden A. B. hath agreed to free and discharge the said obligee from 2 several obligations &c.* Now the condition of this obligation is such, that if the said A. B. do save and keep harmless the obligee of and from the said 2 several obligations, then this present obligation to be void; tho' in this case the words prima facie seem to restrain the condition to the last part only, scilicet, to save him harmless from the 2 obligations, yet in as much as it appears that the intent was to extend to the recognizances by the first words, the condition of this obligation is such, and likewise by the word (also) in the last clause, scilicet (whereas also) or otherways the first words (the condition of this obligation is such) will be void; the first part, as to the discharge of the recognizance, shall be part of the condition also, for the first part is a perfect sentence to make it a condition; but these words to be added thereto, scilicet, (then the said obligation to be void) which words will serve well for (*) both clauses, and the intervening recital (whereas &c.) will not binder it. Mich. 1649, between *Ingoldesby and Steward* adjudged per cur. præter Jernyn. Intratur Cr. 1649. Rot. 1284.]



* Fol. 410.

3, A man made obligation, and after the date, and at the end of a clause was compris'd, that if he pay the moiety of the sum, that then the obligation shall be void; and the opinion of the court was, that it is a good condition. Br. obligation, pl. 89. cites 30 E. 3. 3. and Fitzh. Bar, 265.

4. Condition of a bond was to save lands from all incumbrances, and before the sealing of the bond there is a memorandum indorsed, that it should not extend to such a particular incumbrance. The indorsement

endorsement was held an explanation of the intent of the parties, and that before the sealing 20 things may be indorsed or subscribed as conditions of the obligation, and they all shall stand. Mo. 679. pl. 930. Mich. 44 & 45 Eliz. B. R. Broke v. Smith.

[52]

(H) By what *Words* it may be created.

Sec (K) pl. 2. S. C. and the notes there.

[1. IF a man *leases to a woman for 40 years upon condition, that si illa tam diu viveret & custodiret seipsam a sole widow, and should inhabit upon the premises*, this is not any condition; for the word (*si*) makes the intention uncertain whether another thing was intended besides the cesser of the term or the re-entry. Mich. 37, 38 Eliz. B. R. between *Sayer and Hardy*, adjudged.]

This was a point made out of the case, Arg. by leaving out the insensible

[2. If a man *leases lands to another, proviso if the rent be arrear*, this is not any condition, because the word (*si*) makes the intention uncertain; for where the proviso is *hypothetical*, it ought to be shewed what he would have. Pasch. 14 Jac. B. R. between *Moodye and Garnon*. Per Cur.

words, and that these words of themselves would make a condition without more, but the whole court e contra for the reason given by Roll. Roll. Rep. 367. pl. 20. Pasch. 14 Jac. B. R. S. C. [but I do not observe S. P. mentioned in any of the other reports of the S. C.]—To make it a good condition it ought to have the following words, viz. *that then it shall be lawful for the feoffor, &c. to enter, &c.* Litt. 331.—And in such case the words *si contingat redditum prædicti retro fore, &c.* that then it shall be lawful to the feoffor, lessor, &c. to enter, &c. make a good condition. Litt. S. 330.

Proviso is as apt a word to make an estate conditional as sub conditione, or any other word of condition; but yet when it shall make an estate or interest conditional, 3 things are to be observed, 1st. That it does not depend upon any other sentence nor participate of it, but that it stands originally of itself. 2dly, That it be the word of the bargainer, feoffor, donor, &c. 3dly, That it be compulsory to enforce the bargain, feoffee, donee, &c. to do an act; resolved. 2 Rep. 70. b. Hill. 4. Eliz. C. B. Lord Cromwell's case — Mo. 106. pl. 249. Andrews's case, S. C. and all the justices agreed that proviso annexed to an exception is only an explanation; and if it be added at the end of a covenant, it extends no further than to defeat the covenant, unless it has words quod tunc the grant shall be void; but being put absolutely in a deed, without dependance upon any particular covenant or exception, it is to be construed as a condition to all the estate.

Mo. 848. pl. 1151. S. C. Resolved that it is not any condition. — he shall refrain the goods upon the tenement, nor is it known what is intended by the word sufficient, scilicet, sufficient reparation, rent, &c. and the words (the land to re-enter into the premises) are without sense. Pasch. 14 Jac. B. R. between *Moodye and Garnon* per cur.]

[3. (So) if a man *leases land to another, proviso if the rent be behind, it shall be lawful for him to restrain, and not being sufficient the ground, to re-enter into the premises, and the same to have again in his former estate*; this is no good condition; for the words are not, that he shall refrain the goods upon the tenement, nor is it known what is intended by the word sufficient, scilicet, sufficient reparation, rent, &c. and the words (the land to re-enter into the premises) are without sense. Pasch. 14 Jac. B. R. between *Moodye and Garnon* per cur.]

Roll Rep. 330. pl. 37. S. C. adjournatur. — Ibid. 367. pl. 20. S. C. and Garnon per cur.]

held accordingly. — 3 Bulst. 153. S. C. adjug'd against the plaintiff per tot. Cur. — Cro. J. 390. pl. 3. Wood v. Germons. Hill. 13 Jac. adjournatur.

* And. 267. pl. 275. S. C. the court adjug'd it to be a condition, and the greater

[4. (So) if a man *leases for years lands by indenture, and after a covenant on the part of the lessor this clause is contained, viz. provided always nevertheless, and it is covenanted and agreed, by and between the said parties, that he the said lessee, his executors, nor assigns, shall alien the premises, but to, &c.* this is a condition and covenant at the election of the lessor. Hill. 33 Eliz. B. between *Simpson*

Simpson and Titterell, adjudged upon a special verdict; which intra-
tur Pasch. 33 Eliz. Rot. 1609. Co. 2. *Lord Cromwell*, 7. b.] a covenant
also.

* Cro. E. 242. pl. 6. S. C. adjudg'd that it was a condition, and the entry lawful. S. C. cited
Arg. Cro. E. 385. S. C. cited Mo. 707. per Cur. S. C. cited per Cur. 2 Rep. 71. b.
S. C. cited 2 And. 72, 73. S. C. cited by the name of Tirrel's case. Win. 36. S. C. cited
by the name of Bendlow's case. Gouldsb. 116. in pl. 12. S. C. cited Lane 109.

† *Ld. Cromwell's* case is 2 Rep. 69. b. to 82. b. Hill, 43 Eliz. C. B. 2 And. 69. pl. 52.
Cromwell v. Andrews, S. C. adjudg'd. Mo. 471. pl. 679. S. C. adjudg'd.

[5. (So) if a man lease lands for years rendering rent, and the
lessee covenants to pay the rent, and not to do waste, and the lessor binds
himself in an obligation, that the lessee shall enjoy the lands for the said
rent, and doing according to the covenants of the said indenture;
these words (for the rent) make not a condition, because he hath
other remedy for the rent, scilicet, upon the indenture of covenants.
Mich. 5 Jac. B. between *Tomkins and Tomkins*.]

for tithes, and the plaintiff granted to the defendant the tithes, and he granted the 40s. rent to the plain-
tiff and his successors for the said tithes; and the defendant said, that the plaintiff had taken 24 loads
of tithes; judgment si actio; and per Littleton and Brian, the grant of one thing for another is
no condition. Br. Conditions, pl. 61. cites 9 E. 4. 19.

6. In annuity, per Brian, and the best opinion, where annuity is
granted till the plaintiff be promoted by the grantor to a competent bene-
fice, and the defendant tenders a benefice, and the plaintiff refuses,
the annuity is determined; for it seems to be a condition in law. But
where it is granted by R. Prior of S. and his covent, till he be pro-
moted to a benefice by the said R. and he dies, the tender of the
successor is not good. Contra if it had been by the said Prior without
name of baptism. Br. Conditions, pl. 69. cites 14 H. 7. 31 & 15
H. 7. 1.

7. The prior of Saint John's of Jerusalem in England leased for
years the commandry of Basill by indenture to Martin Docknye, pro-
visa, that if the said Prior, or any of his brothers there being com-
manders would inhabit in it, that then the said M. D. and his assigns
oblige themselves by the said indenture, upon a year's warning, to remove
or give place to the said prior. And after the prior died, and one who
was brother at the time of the demise was made prior, and was also com-
mander, by which he gave warning by a year to M. D. who would
not go out, and the prior entered. The question was, Whether
the words above were a condition or only a covenant conditional?
and per Knightly and Marvin, serjeants, it is not a condition to for-
feit the lease, but is a covenant conditional; viz. that if the lessee
be required then he covenanted to remove, and otherwise not. But
per Audly Chancellor, Fitzherbert J. and Donishall and Chamley,
serjeants, it is a condition, quod mirum! But per Audly, Knightly,
and Marvin, if it be a condition it does not extend to the suc-
cessor, and there is a diversity between rent reserved generally and a
condition; for if a man leases for years or life rendering rent, and does
not say to him and his heirs or successors, yet the heir or successor
shall have it; for it is part of the reversion; quod nota; But if it
be leased upon condition, &c. that the lessor may enter, and does not
speak of his heirs nor successors, there, by the death of the lessor,
the condition is extinct; note a diversity. And per Knightly these
words,

words, *ea intentione quando & tunc* makes a condition as well as these words, *sub conditione, proviso semper & si contingat &c.* Br. conditions, pl. 7. cites 27 H. 8. 14, 15.

8. A lease for years was made to husband and wife, *provided, that if they had a mind to dispose of the term, that then the lessor should have the first offer, he giving as much for it as another would*; the question was, whether this was a condition or a covenant? Shelly held clearly that it was a condition, but Fitzherbert and Baldwin doubted. D. 13. b. pl. 65. Trin. 28 H. 8. Anon.

The meaning is, viz. (to be performed or not done)

2 Rep. 71.

a. by the Reporter, who observes, that

this case which is commonly cited to prove that proviso does not make a condition, when it comes among other covenants does not warrant it; but if it be well observed the opinion there is good law, and stands well with the principal case; viz. Lord Cromwell's case.—When upon the habendum a proviso is added for a thing to be done by him to whom the deed is made, or to restrain him to do any thing, this is a condition. Poph. 118. Hill. 38 Eliz. in case of Pembroke (earl) v. Berkley.

* [27]

S. P. agreed

by the reporter, 2

Rep. 72. a.

in lord

Cromwell's

case; for as

to the scouring

the ditch

and carrying

the mud to

such a field,

it depends

upon the precedent

covenant, and

without the precedent

covenant it cannot

stand; And the other

part of the difference

is also agreed by

him, because by its

not depending on

any precedent clause,

but standing by itself,

this makes it a

condition; and says,

that all this is good

law, and well stands

with the resolutions

of the said justices

in the principal case;

and so the quere

made by Brooke is

fully resolved.

10. As it is covenanted in the indenture, *that the lessee shall make the reparations, provided always, that the lessor shall find the great timber.* This is no condition. Ibid.

11. Nor by some it is no condition when it goes among other conventions upon [the part of] the lessee. Ibid.

12. As if it covenanted after the habendum and after the reddendum, *that the lessee shall scour his ditches, &c. provided always that the lessee shall carry the mud of it to such a field*; this is no condition to forfeit the lease for not doing of it. Contra if such proviso be put immediately after the habendum, which makes the estate, or after the reddendum; quod nota, & quære. Br. Conditions, pl. 195. cites 35 H. 8.

upon the precedent covenant, and without the precedent covenant it cannot stand; And the other part of the difference is also agreed by him, because by its not depending on any precedent clause, but standing by itself, this makes it a condition; and says, that all this is good law, and well stands with the resolutions of the said justices in the principal case; and so the quere made by Brooke is fully resolved.

13. No words make condition, unless such as restrain the thing given; As upon condition that he shall not do such an act; for if they do not restrain the thing given, it is rather a limitation than a condition; As if I make a lease for life upon condition, *that if the lessee does waste I may enter.* This is only a limitation of the time of my entry, which is void, because it is no more than the law says, and is no condition because it does not restrain the estate; So if I make lease for life upon condition, *that if the lessee commits waste, and I recover the place wasted, that I shall enter into it.* This is no condition for the reason before mentioned; but if it had been upon condition, *that if I recover in waste any part, that I shall enter into the whole,* this is a condition for that part in which the waste was not done, because the condition is restrictive, and goes in defeasance of this part. Per Hinde J. pl. c. 33. a. Pasch. 4 E. 6. in case of Colthurst v. Benjushin.

14. A bishop made a lease for years of certain lands reserving rent, which was confirmed by the dean and chapter, and in the lease was a *proviso*, that, in *tempore vacationis episcopatus*, the rent should be paid to the chapter. It was held that this proviso was no condition, but a foreprise of saving in the sentence of the reservation of the rent, and as an agreement or covenant; for it is not annexed to the estate, nor to the thing given. D. 22 r. b. pl. 20. Pasch. 5 Eliz. Ayer v. Orme.

Benll. 129. pl. 197. S. C. the proviso is not a condition but a limitation, or demonstration.—Mo. 51. pl. 142. Eire's case, S. C.

resolv'd, that this proviso was well enough placed to make condition, because annexed to the reservation of the rent, the non-performance whereof may, by the intent of the parties, determine the estate of the lease, tho' it does not go to the non-payment, but to the manner of payment, viz. payment to the chapter, otherwise it is where the proviso is adjoined to the exception or to the special covenant; for there it shall be intended sometimes a declaration, sometimes an explanation, and sometimes a restriction of the particular thing to which it is adjoin'd, and not a condition to the whole estate.—Dal. 53. pl. 31. S. C. Walthe and Weston held it a condition, but Brown and Dyer e contra; but Dyer said, that he thought proviso is a good word to make a condition when it is annexed to the principal matter leased, and may be either in the affirmative or the negative, when it is annexed to the thing leased and to the estate, if it abridges the thing leased, it is not a condition, as lease for years proviso that he shall not meddle with the wood.

15. A. leased to B. for life, and that it should be lawful for him to take fuel upon the premises, *proviso that he does not cut any great trees*. If B. cuts great trees he is punishable in waste, but A. cannot re-enter; for the proviso is not a condition, but only an exposition of the intent of the grant in that behalf. 3 Le. 16. pl. 38. Mich. 14 Eliz. C. B. Anon.

Lease for years proviso that it shall not be lawful to the lessee to lop the trees. Dyer thought it

a condition, but Brown thought it only a restraint, if no penalty ensues upon it. Mo. 45. pl. 136. Mich. 5 Eliz. Anon.

16. Arbitrators award that A. shall have the lands, *yielding and paying* 10l. per ann. in this case it is not a condition, for it is not knit to the land by the owner itself, but by a *stranger*, viz. the arbitrator. 3 Le. 58. pl. 86. Mich. 17 Eliz. B. R. Tresham v. Robins. [55]

17. *Recoverers to an use before the statute 27 H. 8. make a lease for years, the lessee covenants that he will pay the rent to cesty que use, his heirs and assigns; proviso, if cesty que use doth not make his heir male his assignee, then he shall pay the rent to the recoverers, their heirs and assigns.* Cesty que dies, and does not make his heirs male his assignee; adjudged, that this proviso was no condition that went to the estate, but only abridged the covenant. Cro. E. 73. pl. 30. Mich. 29 & 30 Eliz. B. R. Scot v. Scot.

2 Le. 128. pl. 170. S. C. states it, that if the lessee makes his heir male his assignee of the term that then he shall pay the said rent to

the recoverers their heirs and assigns, and not to the heirs of cesty que use. It was argued whether this proviso makes a condition or not, sed adjournatur.—3 Le. 225. pl. 302. S. C. argued again, sed adjournatur.—4 Le. 70. pl. 161. S. C. and states it again, that the rent was reserved payable to the recoverers, and after their death then to cesty que use his heirs and assigns, proviso, that if the lessee makes his heir male his assignee of the term, that then he pay the rent to the recoverers, their heirs and assigns, and lessee did not pay it to the heirs of cesty que use, whereupon was a distress and a replevin. Argued, whether a condition or not, and is in totidem verbis with a Le. 128. & adjournatur.—4 Le. 39. pl. 126 Scot v. Scot is a D. P.

18. In some cases this word proviso is not a condition, but only an explanation of a sentence precedent. If it be in the negative, and makes restraint of the common law, then 'tis a condition, as lease for years, proviso not to alien or do waste; and if the proviso be in the affirmative

affirmative, and by that the party be *bound to do what by common right he is not bound to do*, it is a condition. Arg. 3 Le. 225. pl. 302. Pasch. 31 Eliz. in case of Scot v. Scot.

In covenant by assignee upon an indenture of lease, and breach assigned by E. v. the defendant pl. added, that 19. Lessor covenanted, that the lessee, paying his rent, shall enjoy the land demised for the whole term; the lessee did not pay, and afterwards is ejected by a title paramount. 2 justices held the covenant conditional, and that lessee should not have advantage without performing the condition created by the word (paying). But Periam J. held strongly, that (paying) did not create a condition. 4 Le. 50. pl. 130. Mich. 32 Eliz. C. B. Anon.

it was, that he should enjoy, *paying the rent &c.* Plaintiff demurred, because it appears that there was not rent due after the assignment, and before the eviction; and it was agreed, that the word (paying) was not a precedent condition, and thereupon the plaintiff had judgment. Sid. 280. Pasch. 18 Car. 2. B. R. Allen v. Babbington.

Lease of land, *paying the rent*, is no condition. 2 Show. 202. pl. 209. Pasch. 34 Car. 2. B. R. anon.—Lessor covenanted that the lessee, *paying the rent, and performing the covenant*, should quietly enjoy; in action by lessee the lessor pleads, that plaintiff did quietly enjoy till the time when lessee cut down wood contrary to his covenant, and then he entered and not before. It was argued, that this covenant was not conditional; for the words (paying and performing) signify no more than that he shall enjoy &c. under the rents and covenants, and it is a clause usually inserted in the covenant for quiet enjoyment; indeed the word *paying* in some cases may amount to a condition; but that is where, without such construction, the party could have no remedy. But here are express covenants in the lease, and a direct reservation of the rent, to which the party concerned may have recourse when he has occasion. The words (paying and yielding) make no condition, nor was it ever known that for such words the lessor entered for non-payment of rent; and there is no difference between these words and the words (paying and performing.) The court took time to consider, and afterwards in this term judgment was given for the plaintiff, that the covenant was not conditional. Atkins J. doubted. 2 Mod. 35. Pasch. 27. Car. 2. C. B. Hayes v. Bickerstaff.—Freem. Rep. 194. pl. 198. S. C. North. Ch. J. said, that this clause is now so usual that it is but *clausula clericorum*, and that if it should be construed conditionally, then if the lessee broke a covenant of the value of a penny, it would excuse the lessor of the breach of a covenant of 1000 l. value. Curia advisavit.—2 Jo. 206. S. C. cited by the Chief J. as adjudged that the word (paying) did not make the covenant conditional, but that it was a reciprocal covenant, for which the party might have action.

Mc. 706 pl. 987. Berkley v. Pembroke: (Earl of) S. C. adjudged accordingly, and in error brought in the exchequer chamber, held that this proviso, placed as it was, tho' there are words of covenant as well as of condition, makes a condition by the intent of the parties.—2 and 20. pl. 14. S. C. says, the judges in bank were in several opinions, and thereupon it being moved to all the other judges and barons, the greater part held it a condition and covenant; because when words contained in a deed go to several purposes and senses, the deed shall be taken according to the sense of the words, without construing any word to be vain, or confounding the sense thereof; as if a deed contains *dedi, remisi, &c.* It may be a deed of grant, feoffment, release, or confirmation, or all of them; as the case requires, which was shewn at large, and judgment accordingly.—Poph. 116. S. C. the chief justices, and chief baron, and all the other justices and barons, præter Gaudy, Clench, Walmley, and Beaumont, held that it was a condition and also a covenant.—Goulsh. 130. pl. 27. S. C. but no judgment

20. The Earl of Pembroke granted the lieutenancy of the Forest of F. to B. and the heirs male of his body, and in the deed of the grant were these words, *provided always, and the said B. doth covenant &c. that the said Earl shall have the command of the game there; provided also, and the said B. doth further covenant not to cut down any wood unless for necessary browse &c.* B. cut down 4 oaks. Gawdy and Clench thought this not to be a condition, but Popham and Fennere contra; for the proviso here has a perfect conclusion, the words (that he shall not cut down trees) referring to the proviso and to the covenant, and so it sounds as well to the condition as to the covenant, and it shall be as if there were several sentences; & adjournatur. But afterwards, upon conference with all the judges of England, the greater part held it to be a condition, and judgment accordingly. Cro. E. 385. pl. 8. Pasch. 37 Eliz. B. R. Pembroke (Earl of) v. Lord Berkley.

judgment.—5 Rep. 76. a. b. S. C. but S. P. does not appear.—Jenk 266. pl. 73. S. C. that this proviso is a condition.—Cro. E. 565. pl. 17. Pasch. 39 Eliz. S. C. upon error brought this matter was assigned, but the justices and barons would not hear any argument, the same having been disputed among them before the judgment given, and by the greater part held to be a condition, and judgment given by their advice accordingly. But for other errors and imperfections in the declaration, the first judgment was reversed.—Mo. 706, 708. accordingly.—2 Rep. 71. b. 72. a. cites S. C. resolved accordingly by all the justices of England upon argument before them at Serjeants Inn, but that it was reversed for default in the count.—A gift in tail is made of a walk in the forest, proviso, and the donee covenanted that he should not fell any trees there, being timber trees; this proviso is a condition, altho' a covenant is also added to this purpose; by all the judges of England, Jenk. 266. pl. 73.—S. C. cited per cur. by the name of Pembret v. Barkley. Palm. 503.

21. Proviso always implies a condition, if there are no subsequent words which may peradventure change it into covenant, as where there is another penalty annexed to it for non-performance, as Dockwray's case, 27 H. 8. 14. but 'tis a rule in provisos, that where the proviso is, that the lessee shall or shall not perform a thing, and no penalty to it, this is a condition, otherwise it is void; but if a penalty is annexed 'tis otherwise; per Periam J. to which all the rest of the justices agreed. Cro. E. 242. pl. 6. Trin. 33 Eliz. B. R. Simpson v. Titterel.

22. A. bargains and sells a manor, to which an advowson was appendant, to B. in fee, and it was agreed between them, that A. should levy a fine to B. of the said manor with the advowson, and it was agreed by the said indenture, that a recovery should be suffered to the intent aforesaid, provided that B. should grant the advowson to A. for life; B. dies before any grant is made by him of the advowson to A. and A. made no request to B. to have the said grant made to him; A. enters into the manor for breach of the condition. Resolved by all the judges of England, and barons of the Exchequer, 1st. That this proviso makes a condition, and that it was well created by force of the statute of uses of 27 H. 8. altho' the estate vested after the condition was created and made. And tho' the proviso be placed in any part of the deed, yet if it be substantive and independant, and relates only to the estate passed, it is a condition; if it be qualified it may amount to covenant only; if there be a proviso and covenant in the deed it may inure to both. Jenk. 252. pl. 43.

S. P. adjudged by the major part of the justices.—Cro. E. 891. pl. 8. S. C. but S. P. does not appear.—Yelv. 3 & 6. S. C.—Nov. 44. S. C. but S. P. does not appear.—Bendl. 201. pl. 239. S. C. in Marg. says the opinion of all the justices was, that the proviso, as it is here placed in the indenture, makes condition; for they said that the sense is to be regarded, and not the place where it stands in the indenture; for if the sense refers so that it tends to a condition, it shall be so, and in the principal case it is most aptly so.—Sav. 115. pl. 187. S. C. adjournatur.

23. A proviso shall be sometimes taken for a condition, and sometimes for an exception, and sometimes for a reservation; and it is taken for a condition; as if a man lease land provided, that the lessee shall not alien without the assent of the lessor, *sub pœna forisfacturæ*, here it is a condition; and if I have two manors both of them named Dale and I lease to you my manor of Dale, provided that you shall have my manor of Dale, in the occupation of J. S. here this proviso is an explanation what manor you shall have; and if a man lease a house, and the lessee covenanteth that he will maintain it, provided always that the lessor is contented to find great timber, here this is a covenant; and if I lease

lease to you my messuage in Dale, provided that I will have a chamber myself, here this is an *exception* of the chamber; and if I make a lease rendering rent at such a feast as J. S. shall name, provided that the feast of Saint Michael shall be one, here this proviso is taken for a *reservation*. Per Popham Ch. J. Gouldsb. 131. pl. 27. Hill. 43 Eliz. in case of E. of Pembroke v. Barkley.

24. A power to *dig up the trees making up hedges* is not a condition; but covenant lies for not repairing the hedge. 2 Show. 202. pl. 209. Pasch. 34 Car. 2. anon.

(H. 2) Where the Cause or Consideration of the Grant will make a condition.

1. IF A. covenants with B. to be his *steward for so much wages*, and B. brings an action for his wages, he ought to surmise and set forth, that he has performed his service which intitles him to his action; Arg. Bulst. 167. cites 18 H. 6. fol. [1. a. pl. 1.] by Fortescue.

IF A. covenants to serve B. for a year and A. covenants to give him so much for his year's service; if B. will bring an action for his money, he ought to shew, that he has served him; Arg. Bulst. 167. Trin. 9. Jac. and cites 5 H. 7. 10. b. — The service is a condition precedent for the wages. Arg. Roll. Rep. 122. cites 15 H. 7. [10. b. pl. 17.] — See tit. Apportionment, fol. 8. g. the case of Worth v. Viner.

2. If a *corody* is granted for certain service to be done, omission of the service determines the corody. Dav. 1. b. cites 20 E. 4. fol. ultimo.

3. If a man for 20 marks, *whereof 10 are paid* in hand, and the other 10 to be paid at Mich. promises and agrees to do such an act after Mich. on a certain day, and *the last 10 marks are not paid* at Mich. or lawfully tendered, the promise and contract is void; for the word *pro* makes the contract conditional. D. 76. a. pl. 29. Mich. 6 E. 6. in case of Andrew v. Boughey.

4. If one covenants *pro maritagio habendo* to make an estate &c. and the marriage does not take effect, the covenantor is discharged of his covenant. D. 76. a. pl. 29. Mich. 6 E. 6. B. R. in case of Andrew v. Boughey.

5. If A. grants to B. a way over his land, and B. *pro chimino illo habendo* grants to A. a rent-charge, the stopping the way is a stopping the rent-charge. D. 76. a. pl. 30. Mich. 6 E. 6.

Bulst. 167. Arg. cites S. C. — Ibid. 168. S. C. cited by Yelverton]. Dav. Rep. 1. b. S. P. cites 9 E. 4. 19. 15 E. 4. 2. 21 E. 3. 7. 45 E. 3. 8. 6 H. 8. 2. and 6 E. 6. 76.

6. There is a diversity between a *gift of lands*, and a gift of *annuity*, or such like. For example, if a man grants an *annuity pro una acra terræ*, in this case this word *pro* shews the cause of the grant and therefore amounts to a condition; for if the *acre* be *evicted* by an older title the annuity shall cease, for cessante causa cessat effectus. Co. Litt. 204. a.

7. So if an annuity be granted *pro decimis* &c. if the grantee be *unjustly disturbed of the tithes* the annuity ceases. Co. Litt. 204. a.

8. So

8. So if an annuity be granted *quod præstaret consilium*, this makes the grant conditional. Co. Litt. 204. a.

9. But if A. *pro una acra terra* makes a feoffment or lease for life of an acre, albeit that the acre be evicted, yet A. shall not re-enter; for in this case there ought to be legal words of condition or qualification; for the cause or consideration shall not avoid the estate of the feoffee; and the reason of this diversity is, for that *the estate of the land is executed*, and the annuity is executory. Co. Litt. 204. a.

10. Sometimes in case of lands or tenements, *causa* shall make a condition; as if a woman gives lands to a man and his heirs, *causa matrimonii prælocuti*; in this case, if she either marry the man, or the man refuses to marry her, she shall have the lands again to her and to her heirs. But, of the other side, if a man gives lands to a woman and her heirs, *causa matrimonii prælocuti*, though he marry her, or the woman refuses, he shall not have the lands again; for it stands not with the modesty of women in this kind to ask advice of learned counsel, as a man may and ought; and the rather, for that in the case of the woman she may aver the cause, (or the reason aforesaid) although it be not contained in the deed, even tho' the feoffment be made without deed. Co. Litt. 204. a.

11. If a man makes a feoffment in fee *ad faciendum*, or *faciendi*, or *ad propositum*, that the feoffee shall do or not do such an act, none of these words make the state in the land conditional; for in the judgment of the law they are no words of condition, and so it was resolved Hill. 18 Eliz. in C. B. in the case of a *common person*; but in the case of *the king* the said or like words do create a condition; and so it is in the case of a *will of a common person*. Co. Litt. 204. a.

12. *Pro* in some cases has the force of a condition *when the thing granted is executory, and the consideration of a grant is a service or some other like thing, for which there is no remedy but the stopping of the thing granted*; as in the case of annuity granted for counsel, or for doing the office of a steward of a court, or the service of a captain, or keeper of the fort, as in Ugthred's case, 7 Rep. And in those cases the condition is not precedent, and therefore needs not be averred performed, when the annuity is demanded; and those cases are within the reason of an exchange, where the land given is evicted, for here the failure of counsel or service is a kind of eviction of that that is to be done for the annuity, in as much as he has no means either to exact the counsel or recompence for it, but to stop the annuity. And is to be noted, that this has so far the force of a condition, that it being denied once, it does avoid the annuity, not for that one payment, but forever. Hob. 41. in pl. 47. Mich. 10 Jac. in the case of Cowper v. Andrews.

(I) Condition by Devise. By what words a condition may be created by devise. [59]

1. IF a man deviles lands deviseable to his executor to sell, and to make distribution of the money for his soul, and dies; if the executor does not sell it, the heir may enter, for this creates a condition. 38 Aff. 3. Adjudged, 39 Aff. 17.

Vol. V.

F

2. (So)

Br. Conditions, pl. 215.
cites S. C.
—See (C. b)
pl. 10. 1.
S. C.

Cro. E. 146. 2. (So) [If a man seised of socage lands, *having two daughters*
 pl. 9. Crick- *devises it to one of the daughters to have and to hold to her and her*
 mere v. Pa- *te son, S. C. heirs, to pay her other sister a certain sum of money at a certain day,*
 te son, S. C. *adjudged, & these words make a condition, so that the other sister, if the money*
 adjudged, & *is not paid, may enter into one moiety for the condition broken,*
 *Fol. 411. *because (*) otherwise she shall be remediless. Mich. 31 & 32 Eliz.*
 S. P. held ac- *B. R. Crickmere's case, adjudged.]*
 cordingly by

all the justices—Le. 174. pl. 242. Crickmere v. Paterfon, S. C. held accordingly by the whole
 court.—S. C. cited arg. as adjudged, that the youngest should have the moiety by way of limitation.
 Gouldsb. 134. in pl. 33.—Co. Litt. 236. b. cites S. C.

Lane 56. 3. (So) [If a man devises lands to *B. for life, paying to C. 6l. rent*
 Sweet v. *yearly, which he wills to be paid at 2 feasts half yearly, and if it be*
 Best, S. C. *arrear, then it shall be lawful to the Lord [to C.] to distrain. It*
 —Devise *seems this word (paying) makes not any condition, in as much as*
 reddendum *a distress is limited upon non-payment thereof. P. 8 Jac. Saccario,*
 & solvendum *between Street and Beale dubitatur.]*
 20 l. yearly *makes a*
 condition Cro. E. 454. pl. 22.

Br. devise;
 pl. 16. cites
 S. C. 4. In assise by a clerk it was found, that the ancestor of the defen-
 dant whose heir, &c. was seised of the *land* devisable in fee, and *de-*
vised it by his testament to the clerk, upon condition that he shall have
the land for his life, and that he shall be chaplain and chaunt for
his soul during his life, and after his death the land shall remain to
the commonalty of D. for ever to find a chaplain for ever; and that be-
cause the plaintiff had held the land by 6 years, and was not chaplain,
the tenant as heir entered upon him; and it appeared by inspection,
that the demandant was of such age as that he might have been chaplain
immediately after the devise; and per Birton, the entry is lawful
clearly. Br. conditions, pl. 111. cites 29 Aff. 17.

D. 163. a. pl.
 52. Trin. 4.
 & 5 P. & M.
 Anon. S. P.
 and seems to
 be S. C. says
 that the par-
 ties agreed,
 but that the
 opinion of
 the justices was bent against the plaintiff, viz. that the entry of the heir was not lawful. — Bendish.
 287. pl. 287. S. C. accordingly.

Ibid. Marg.
 says, that no
 judgment
 was given in
 this case of
 Dyer, and
 that it seem'd
 [60]
 to be a ju-
 stices, that
 the heir
 (who had
 brought
 objection
 breach of
 6. A. devised Lands in London to *B. and C. to hold in common*
upon condition to pay a rent to his wife at the 4 usual feasts of the year,
and if the rent be behind by 6 weeks, being lawfully demanded, that it
shall be lawful for the wife to distrain; and added, that his full intent
was that she should be annually paid the said rent accordingly. The
question was, if the entry of the heir be lawful or not? or if the pe-
nalty of the express condition be destroyed by the penalty of the
distress, and so a limitation of the payment of the rent to the
feme, and the heir to take no advantage of the breach of the
condition? Manwood and Mounson held, that the heir should not
enter for the breach; but Dyer and Harper e contra clearly, and so
was the opinion of Wray Ch. J. and Saunders Ch. B. in præsentia

Manwood

Manwood ad Menfam, and that both penalties, viz. the condition and re-entry, and the distress to the feme for non-payment, are good remedies and securities for the firm payment of the rent to the feme according to the intent of her baron; and as to the demand of the rent, they thought she need not make any such demand, but that it is payable by the devisees at their peril, if they would save their land; but that the feme ought to demand it before she makes any distress. D. 348. a. b. pl. 13. Hill. 18 Eliz. Anon.

of years, yielding and paying 20l. yearly at Michaelmas to J. D. The 20l. not being paid, the heir entered supposing that those words made a condition, and his entry was adjudged congeable. Cro. E. 454. pl. 22. Trin 37 Eliz C. B. Fox v. Carlyne.

7. A. seised of land in fee, by his will in writing, granted a rent-charge of 5l. per ann. out of it to his younger son towards his education and bringing up in learning; and if in pleading the devisee ought to aver, that he was brought up in learning was the question; and it was holden by Dyer, Manwood and Mounson, that such averment needs not, for the devise is not conditional, and therefore, altho' he be not brought up in learning, yet he shall have the rent. 2 Le. 154. pl. 186. 19 Eliz. C. B. anon.

8. A man devised land to his wife, *proviso my will is, that she shall keep it in good repairs*, cited per Cur. to have been adjudged. Le. 174. in pl. 242. Trin. 30 Eliz.

9. A. devised lands to B. *paying 40l. to C.* it is a good condition; for C. has no other remedy, and a will ought to be expounded according to the intent of the devisor; per Wray. Le. 174. pl. 242. Trin. 30. Eliz. B. R.

10. A man devised a house in London to his wife, *provided if she clearly departs out of London, and dwells in the country, that she shall have a rent out of the same &c.* It was agreed, that this was a good proviso to determine her estate, tho' there be no words that the estate shall cease &c. Cro. E. 238, pl. 5. Trin. 33 Eliz. B. R. Allen v. Hill.

(K) Condition or Limitation. What shall be said a Condition, and what a Limitation.

IF a man devises land to his daughter in tail, with divers remainders over; *proviso* that his daughter and every one in remainder should permit and suffer T. (who then enjoyed the said land) to enjoy the said land during his life: this shall not be any limitation upon the estate of the daughter, though she be heir general, and so she herself is to have the advantage thereof, if it be a condition as it seems because this is the proper word for a condition. Mich. 37 Eliz. B. Thomas's case. Per Cur. admitted.

2. If a man *lives* to a woman for 40 years, upon condition *Quod si tum diu viveret, & custodiret seipsam a sole widow, & inhabitaret* upon the premises; this is not any limitation, because the words upon condition that if she make the intention uncertain, and therefore

Clench, and the lease determines not by the death of the lessee. Mich. 37, 38 Popham, Eliz. B. between *Sayer and Hardy* adjudged.

held the words (quod si) not being answered with other words (quod tunc) and thereby to make the intention of the parties full what it was that should be done, to be without sense, and otherwise the intention cannot be judged of; for it might be that she should forfeit a penalty, or part of the term, or of the profits; but that for this uncertainty the lease is absolute, and the words void, and neither make a limitation nor a condition; but Popham held that had the words been that the lease was for 40 years, if she so long lived unmarried, and inhabited therein, it would be a limitation, and the lease would determine by her marriage or death so that she could not inhabit therein; and so it was affirmed was the truth of the case, but was mistaken drawing the verdict; for the words (sub hac conditione) were not in the lease; but Fenner held the words sub hac conditione full enough of themselves to make a condition of re entry, and are a condition, and not a limitation, and that this condition is well performed, and the lease is absolute, and therefore adjudged for the plaintiff.—Poph. 99. *Sawyer v. Hardy*, S. C. Popham Ch. J. held that if the word (Si) had been omitted, it would have been good to determine the lease: but by reason of the uncertainty occasioned by that word, he and Gawdy, and Clench, held it should be taken as a void clause, and they all agreed that had it been Si tam diu sola viveret & inhabitaret in eodem mesuagio, the lease had determined by her marriage or death; and Popham took a difference between the words dwelling there during the term, and dwelling there during his life, and that in the last case it would be good for 40 years.—Mo. 400 pl. 525. S. C. adjudged that the term was not determined, but went to the executors; but otherwise it had been if the words of the lease had been Si tam diu vixerit vidua; for there the words make a limitation collateral to the term; but here the breach does not come without marriage or non-habitation by the intent of the words sub conditione quod &c. and so a diversity between a limitation and conditional words.—Ow. 107. *Sawyer v. Hardy*, S. C. adjudged that the term continued.—Gouldsb. 179. pl. 112. S. C. adjudged accordingly; and Popham and Clench held, that if the words (sub conditione quod) had been omitted, it would have been a limitation.

Cro. E. 833. 3. If a man having *three sons* devises his lands to the eldest, upon condition that he shall pay 20 l. to every of the other two sons, and that if he fails in payment thereof to any of the sons, that then they may enter, and have the land, this is a limitation; so that if the eldest does not pay the money, the two sons may enter into the land. Tr. 43 Eliz. B. R. between *Haynsworth and Pretty* adjudged per cur.

had devised that if his eldest son did not pay all legacies, his lands should go to the legatories. And ibid. 919, 520. pl. 14. Hill. 45 Eliz. B. R. resolved accordingly by all the justices, and judgment for the defendant; for it is an immediate devise or limitation to the other two sons, if the eldest does not perform the condition.—Mo. 644. pl. 891. *Haynsworth v. Pretty*, S. C. resolved that the failure of payment is condition precedent to the devise of the land to the younger sons, and not any condition or limitation to the estate of the eldest son; and also that non-payment to one of them will give the estate to both, tho' payment be made to the other.—Noy 51. *Aynsworth v. Batty*, S. C. resolved accordingly.—S. C. cited by Vaughan Ch. J. Vaughan. 271.

See Lane, 74 to 79 &c. S. C. See Tit. Prerogative (M. c) pl. 7. S. C. 4. If the king leases for years, rendering rent, and by the same deed the lessee convenit & concedit with the king, his heirs and successors, not only de novo to repair the bill leased within one year after, but also to keep it in repair during the term; this is a limitation in the King, in as much as it is an executory consideration; so that by the non-performance thereof, the lease shall be void. Pasch. 10 Jac. Saccario, between *Sawyer and East*, for *Croshe Mills*, adjudged.

Cro. E. 376. 5. If a man hath issue two sons, scilicet, R. the eldest, and P. the youngest, and also two daughters, and devises certain lands to H. in tail when he comes to 24 years of age, upon condition that he shall pay unto my two daughters 20l. a year at their full age, and if the said H. dies before 24 then I will that R. my son and heir, shall have the land to him and his heirs, he giving and paying to my said daughters the said money in such manner, as H. should have done if he had lived; and if my sons H. and R. (if the said lands come to the said R. by the death

death of H.) do not pay the said money to my said daughters as afore-
 said then I will my said land *shall remain to my daughters and their*
heirs for ever; and after the deviser dies. This is a limitation up-
 on the estate of H. and not a condition; so that if H. does not pay
 the money to my said 2 daughters after his age of 24 years, and at
 the full age of the daughters, R. shall have it by way of limitation,
 and cannot enter as for a condition broke, because that (*) other-
 wife, scilicet, if this shall be a condition, it would defeat the portions
 given to the daughters, and the future devise to them, which is a-
 gainst the intent of the deviser. Mich. 38, 39 Eliz. B. R. between
Wiseman and Baldwin; adjudged in a writ of error per totam Cur.
 and the judgment given to the contrary in Banco reversed.

limitation by 3 justi-
 ces, but
 [62]
 Owene con-
 tra—But
 in writ of
 error
 * Fol. 412.
 brought in
 B. R. the
 judgment
 in C. B. was

reversed by 3 judges.—Ow. 112, 113. S. C. in B. R. the judgment in C. B. was reversed by
 3 judges (absente the Ch. J. as it seems).—Gouldsb. 152. pl. 90. S. C. and Gawdy, Clench,
 and Fenner agreed it to be a limitation and no condition, and therefore reversed the first judgment.

6. If a man devises lands to another in tail, upon condition that he
 shall not alien, and that if he dies without issue, it shall remain over
 to another in fee; and after the devisee aliens, yet he in remainder
 cannot enter for the condition broke, but the heir at the common law;
 for this is not any limitation but a condition. Mich. 10 Jac. B.
 between *Skirne and Dame Bond*, per Coke and Warburton.

* See (E)
 pl. 6. S. P.

7. If a man devises 20l. by his testament, to W. N. to be paid in
 4 years, and he dies in the first year, yet his executors shall have it;
 for this is no condition, but a limitation of payment. Br. conditions
 pl. 187. cites 24 H. 8.

8. A man seised of land in gavelkind has issue 2 sons, and by will
 devised it to the eldest son in fee, upon condition that he pay to the wife of
 the deviser 100l. at a certain day. He did not pay the money at the
 day. Manwood doubted whether the youngest might enter or not
 upon his brother's moiety as by a limitation implied in the estate, if
 the condition be not performed. D. 316. b. pl. 5. Mich. 14. & 15
 Eliz. Anon.

Accepyholder
 in borough
 English sur-
 render'd to
 the use of
 his will,
 and after
 devised to
 his wife for
 life, re-

mainder to his eldest son paying 40s. to each of his brothers and his sister within 2 years after his wife's
 death. The court held this a limitation, and not a condition; for if it be a condition it extin-
 guishes in the heir, and there would be no remedy for the money; but being a limitation, the law
 will construe it that on non-payment his estate shall cease, and then the law will carry it to the
 heir by the custom, without any limitation over; and judgment accordingly. Cro. E. 204. pl. 39.
 Mich. 32 & 33 Eliz. B. R. Wellock v. Hammond.—a Le. 114. pl. 152. S. C. adjudged a
 limitation.—S. C. cited very full, 3 Rep. 20. b. 21. a. as adjudg'd accordingly, and that so the doubt
 in D. 14 Eliz. 317. moved by Manwood is well resolved.—S. C. cited per Cur, Cro. J. 592.—S. C.
 cited Arg. 2 Brownl. 69.—S. C. cited 10 Rep. 41.—S. C. cited Lat. 9.—S. C. cited
 Cart. 93.

A copyholder in fee of lands in Borough English had issue three sons, B. C. and D. and surrender'd
 it to the use of his will, by which he devised it to C. in fee, upon condition he should pay to his 4
 daughters 20l. a piece at their full age, and dies; B. had issue 2 daughters, and dies; C. is admitted
 and does not pay the said sum to the daughters at their full age; D. in the name of the 2 daughters
 of B. enters, and they disassent, and after he enters in his own name, and surrender'd to the use
 of the defendant, who is admitted. It was held by all the justices except Williams, that it is a con-
 dition; for it shall be expounded according to the common law, where it is not necessary to expound
 it otherwise. Cro. J. 56. pl. 2. Hill. 2 Jac. B. R. Curtis v. Wolverston.

9. A man devises his house and certain land to his father for life,
 proviso that if he will inhabit upon it, then it shall remain to the lord;
 this was adjudged to be no condition, but a limitation of the re-

mainder

mainder, and that the heir of the devisor cannot enter for the non-performance. Dal. 117. pl. 12. 16. Eliz. Anon.

And 184.
pl. 220.
Paine v.
Samms S.C.
but S. P.
does not
clearly ap-

[63]
pear —

8 Rep. 34.
Paine's case.
S. C. and
Gouldb. 81.
pl. 22.
Plain v.
Sams, S. C.
but S. P. does not appear.

10. The Mother having 2 daughters, E. and F. covenanted to stand seised to the use of E. the eldest in tail, upon condition that she pay to F. 300l. within a year after her decease, or after F. should be 18, and if she fail, or die without issue before payment, then to the use of F. in tail. The mother died, E. married and had issue, but died soon after without issue, before the time for payment. The court held clearly as to the point of dying without issue, the same is not a condition, but rather a limitation of the estate, and they amount to no more than what the law saith without them, (viz.) If she die without issue, the estate tail would be spent by that means, and does not cease, or is cut off by any limitation. 1 Le. pl. 233. Mich. 30 & 31 Eliz. C. B. Samms v. Paine.

S. P. Co.
Litt. 214. b.
— 2 Med.
7. cites the case of Williams v. Fry. S. P.

11. Limitation determines the estate without entry. 10 Rep. 40. b. Trin. 11 Jac. in Mary Portington's case.

The nature
of a condi-
tion is to
draw back
the estate
to the fe-
offor, do-
nor, or
lessor; but
a limitation
carries the
estate fur-
ther. Per
Walmley J.
Le. 299.
pl. 409. Mich. 28 Eliz. —

12. Condition defeats the estate, and all remainders depending upon it, and the party or his heir only shall have benefit of it; but limitation determines the estate, and the remainder continues upon it. Jo. 58. Mich. 22 Jac. B. R. in case of Foye and Hynde.

13. So that if A. was tenant for life, remainder to B. in fee, on condition that A. being a feme sole continues a widow; if A. marries, the heir enters, and defeats the estate of A. and of B. also; but if an estate had been granted to A. durante viduata remainder to B. and after A. had married, the estate of A. had determined by the limitation, and the remainder to B. should be granted. Jo. 58. Mich. 22 Jac. B. R. in case of Foy v. Hynde.

Limitation is when the first estate is destroyed, and new estate limited by way of remainder, or otherwise. Sav. 77. in S. C.

14. If one devise a term to A. paying to B. so much per ann. and for non-payment, that he may enter into parcel, this is a limitation not a condition. 2 Sid. 130, 131. 151. Pasch. 1659. B. R. Fynmore v. Crockford.

15. Devise to J. his eldest son for life, remainder to him in tail, remainder to R. in tail, remainder to W. in tail, remainder to M. in tail, provided, and upon condition, that J. and his heirs shall pay to the 3 brothers an annuity of 20l. apiece out of the said lands, and that he shall marry a wife of 1000l. portion, upon default whereof he devises all these lands to his 3 sons and their several heirs male for ever, as before is limited, equally to be divided amongst them, and that it should be lawful to enter &c. Tho' this devise is said to be upon expresse words of a condition, yet it is but a limitation of the estate; for if it were a condition the estate were frustrate and the heirs at law should have advantage of it. A devise to the eldest son, tho' it be by words of a condition, yet it is a limitation, and upon the limitation it ceases without entry or claim, and cites Boraston's case, 3 Rep.

3 Rep. fol. 21. So that by the breach or non-performance the estates of J. ceases, and it now vests in R. Cart. 171. Hill. 18 & 19 Car. 2. C. B. per Bridgman Ch. J. in case of Rundale v. Eeley & al'.

16. It is the office of a limitation generally to *determine the estate without entry* or claim, and that a *stranger* at common law may *take advantage* of a limitation. Agreed and admitted by Serjeant Jones, Arg. but he said, that there is a *difference between a limitation dependant upon a collateral single act to be performed unica vice*, and a limitation dependant on payment of rent which arises out of the land, which by its creation may have continuance of *successive acts*; but that this difference does not extend to the case of a dummodo solverit redditum, and therefore will require a particular answer. That the principal case is of a rent issuing out of land and to have continuance in successive acts, but 'tis not so in the limitations in the other cases; and tho' the books cited all concur, that the estate determines without entry or claim, yet no authority has been cited, [64] where, in case of a rent, the estate shall determine without demand of the rent; the reason whereof seems to be, because there is other remedy for the rent without such rigour, but not in the other cases. 2 Jo. 32. Hill. 19 Car. 2 in case of Tustian (alias Tufton) v. Temple,

17. The Earl of N. devised a house and lands to his wife for life, and after her death to his granddaughter A. K. and the heirs of her body, provided always, and upon condition, that she marry with consent of his said wife &c. but otherwise he bequeaths it to P. It was held, that this proviso made a limitation of the estate to let in the remainder man; for tho' the word condition be used, yet limiting a remainder over makes it a limitation; and if it were a condition, then none could enter for a breach of it but the heir, which seems to be against the intent of the testament. Vent. 199. Pasch. 24 Car. 2. B. R. Fry's case [als'] Fry v. Porter.

most always be conformable according to the intention of the parties, and cites several cases by which it appears, that words of condition in a will shall enure as a limitation; and tho' in Mary Portington's case, 10 Rep. it is said otherwise, yet that is but an accumulative reason which was not necessary. — 2 Lev. 21. S. C. adjudg'd accordingly. — Mod. 86. Porter v. Fry S. C. but the word (provided) is not mentioned, but only the words (upon condition) — S. C. cited per Cur. 2 Salk. 570. — Vent. 202, 203. in S. C. Hale Ch. J. said, that this had received as many resolutions as ever any point did, and cites several cases, and said, that nothing but the opinion in Mary Portington's case, 10 Rep. 41. was against it. — Vent. 322. cites the S. P. in 10 Rep. in M. Portington's case, but says, that the current of authorities since are otherwise.

18. Holt Ch. J. said, he saw no reason why *express words of condition* might not be construed as a limitation in deed as well in a will, tho' the law had not been carried so far. 2 Salk. 570. Trin. 3 Annæ, B. R. in case of Page v. Heyward.

(L) Upon what Conveyance it may be annexed.

Fitzh. condition, pl. 14 cites S. C. and 17 Aff. pl. 2. — Co. Litt. 274. b. S. P. where it is made by a disseisor, — See Tit. release (W).

A release may be made upon condition, per Penrose and Perle, which was affirmed per Cur. in the argument of the case. Br. releases, pl. 39. cites 43 Aff. 12.

A man cannot release a right or chose in action upon condition, and reserve the thing by the condition; for all is gone by the release, and the condition is void; Quere inde &c. by the opinion of Fineux. Br. releases, pl. 32. cites 21 H. 7. 24. — Br. conditions, pl. 84. cites S. C. & S. P. by Fineux Ch. J.

A release cannot be on condition, nor for a time. Kelw. 88. a. pl. 2. and 89. a. pl. 8. Hill, 22 H. 7.

In debt defendant pleads one of the common letters of licence under the hand and seal of the plaintiff, whereby he gives the defendant liberty for three months, and covenants, that if he should sue or molest him in that time, the defendant should be acquitted of the debt; and that he did sue him, &c. Plaintiff demurs. The quere was, if this should amount to a release? and held by the court, that it being under seal, and the plaintiffs own agreement, it was not barely a covenant, but a release upon condition, and accordingly judgment for the defendant. 2 Show. 446. pl. 411. Mich. 1 Jac. 2. B. R. Macbeth v. Cobb — S. C. cited, and S. P. seems to be admitted. Arg. Show. 331. Mich. 3 W. & M.

See (N) pl. 3. — The original Word is (Faire) [2. If a copyholder surrenders to the Lord to * do his will, upon condition to pay 15l. this is a good condition. Mich. 2 Jac. B. Garden's case, per Cur.]

which signifies either to make or do, which Mr Danvers translates to make; but seems (to do) best answers the meaning here.

[65]

* Br. surrender pl. 41. [3. A lessee may surrender upon condition. * 14 E. 4. 6. adjudged, Co. 4. Andrew Corbet. 28. b. † 44 Aff. 3.

26. [but this in the large edition seems misprinted, and that it should be 7 E. 4. 6. as in Roll, and so are the other editions.] — Br. conditions, pl. 156. (155) cites S. C. that it was upon condition rendering rent, and for default of payment a re-entry; but Brooke says that it seems it ought to be by deed indented — Br. Dower, pl. 74. cites S. C. that surrender may well be upon condition.

A surrender may be upon condition, and therefore Brooke says it seems to him that a release may. Br. conditions, pl. 203. cites 7 E. 4. 29. and 43 Aff. 12. — Note, by the justices and sergeants, that a man may † surrender a term upon condition without deed; contra of an estate for life; for this ought to be by deed. B. R. conditions, pl. 149. cites 7 E. 4. 29. † Br. releases, pl. 34.

cites S. C. and Brooke says, the same law seems to be of a release — Release may be made upon condition, per Penrose and Perle, quod affirmatur per Cur. in the argument of the case. Br. releases, pl. 39. cites 43 Aff. 12 & 41. † Br. surrender, pl. 37. cites S. C. — Fitzh. Affise, pl. 355. cites S. C.

Fitzh. affise, pl. 355. [4. A confirmation may be upon condition. Co. 5. Ford, 81. b.] cites 44 Aff. pl. 3. S. P. — Br. surrender, pl. 37. cites S. C. & S. P. — Br. Tender, pl. 40. cites S. C. & S. P.

* In the case of Warren v. Lec — Perk. S. 563. cites 29 Aff. 17. S. P. — Br. devise, pl. 16. cites S. C. — Br. conditions, pl. 111. cite S. C.

[5. A devise of lands deviseable was good at common law upon condition. * D. 3 Ma. 127. 52.]

[6. A devise of an use at common law was good upon condition. D. 3 Ma. 127. 52.]

[7. A.

[7. A devise *within* 32 & 34 H. 8. may be upon condition, because the statute gives liberty to devise at pleasure. D. 2, 3. Ma. 127. 52.]

[8. A man cannot *release a personal thing*, as an obligation *upon a condition subsequent*, but the condition will be void, because a personal thing being once suspended is perpetually extinguished. Hill. 9 Car. B. R. between *Barkly and Parks*, per Cur. agreed.]

[9. *But* a man may release a personal thing as an obligation or such like, *upon a condition precedent*, for there the action is not suspended till the condition performed. P. 10 Car. B. R. between *Barkly and Parks*, adjudged upon a demurrer, where the release was of an obligation with a proviso, that he who released might enjoy 120l. due by J. S. at a day then after to come, which was a condition precedent, as the court then adjudged it.]

10. Land was given in tail, so that the donee may alien in profit of his issue; and per Wilby this is a good condition; Brook says quære if he may alien. Br. Taile & Dones &c. pl. 7. cites 46 E. 3, 4.

11. *Contra* of a gift or grant of land, franktenement, or chattel, where the same thing passed; but by the release the chose en action, or right, is extinguished, and can't be reserved by release. Quære inde. Br. conditions, pl. 84, cites 21 H. 7, 24. Per Fineux Ch. J.

12. In dower the defendant pleaded, that he dedit & concessit to her a rent in recompence of her dower, which she accepted of. The demandant replied that it was upon condition, that if the rent should not be paid within a month, the rent should cease, and the deed should be void. It was held to be no bar of dower, and judgment for the demandant, and the plaintiff was restored to her dower without having made any demand of the rent. Cro. E. 451. pl. 19. Mich. 37 & 38 Eliz. C. B. Wentworth v. Wentworth.

13. A. made a *feoffment* to the use of himself for life, remainder to his wife for life, remainder to his own right heirs, provided if his son interrupt his wife, it should be to the use of the wife and her heirs. A. made a lease for years to begin after his decease, and died; the son disturbs the wife. Resolved per 2 justices that no use would arise to give the wife the fee. Arg. Cro. E. 765. cites it as Hill. 42 Eliz. Leigh v. Burton.

beirs was the antient reversion, and no new estate, and that condition cannot be annexed thereto. Ibid. —Mo. 742. pl. 1022 Mich. 41 & 42 Eliz. Barton's case—S. C. resolved by Popham and Anderson Ch. J. that the future use was checked by the lease, and that it should arise by reason of this disturbance.

But Godfrey Arg. said he conceived the reason to be because the use limited to the right

14. If a condition be released upon condition, the release is good, and the condition void, Co, Litt, 274. b.

(M) Upon what act it may be created.

[1. THE tenant cannot attorn to the grant of a seignory upon condition, because this is but a consent, and no interest passes from him. Vide 15 E. 3. Assise 95.

Attornment to a grantee upon condition, the condi-

condition is void; because the grantee is once settled. But this is to be understood of a *condition subsequent*, and not of a condition precedent, for in this case the condition precedent is good. Co. Litt. 274. b. — 2 Rep 68. a. S. P. — for there is no attornment till the condition is performed. — 5 Rep. 81 a. b. Pasch. 37 Eliz. C. B. in Ford's case. S. P. — The learning of attornments is now of very little use since the stat. 4 Ann. cap. 16 S. 9, 10. and 11 Geo. 21 cap. 19. §. 11.

2. If a man *devise* a term to J. S. and the executors assent that J. S. and J. N. shall have the term, or that J. S. shall have it upon condition; in this case J. S. shall have the term solely and absolutely; for after the assent of the executors, he is in by the devise; per Cur. 4 Rep. 28. b. Trin. 33 Eliz. B. R.

3. A *resignation by a parson* cannot be upon condition, because it is a *judicial act* to which a condition cannot be annexed, no more than an ordinary can admit upon condition, or a judgment be confessed upon condition, which are judicial acts; Arg. And afterwards upon arguments given in writing by the civilians, judgment was entred accordingly for the plaintiff. Ow. 12, 13. 34 Eliz. C. B. Gayton's case.

Cro. J. 614. pl. 4 Pasch. 18 Jac. B. R. 4. Executor cannot *deliver a legacy* conditionally. per Fenner, to which Popham agreed. Cro. E. 462. pl. 8. Hill. 38 Eliz. B. R. the S. P. admitted per Cur. — In such case the condition is void. Arg. Roll rep. 140. — S. P. admitted cro. E. 462. pl. 8. by Fenner and agreed by Popham.

Such assignment is void, and she is in paramount. Arg. Cro. E. 451, 452. in pl. 19. — Cro. J. 614. pl. 4. Pasch. 18 Jac. B. R. the S. P. admitted per Cur. 5. The heir cannot *assign dower* upon condition. Per Fenner J. to which Popham agreed. Cro. E. 462. pl. 8. Hill. 38 Eliz. B. R.

Cro. E. 461. pl. 8. Hill. 38 Eliz. B. R. Had- 6. A *licence to a copyholder* to make a *lease for years* cannot be made to be void by a *condition subsequent* to the execution thereof, to undo that which was once well executed; But there may be a condition precedent united to it, because in such a case it is no licence until the condition performed. Agreed per tot. Cur. Poph. 106. Hill. 38 Eliz. in case of Hall v. Arrowsmith. by Fenner, that a lord cannot limit a condition in his licence; because he gives nothing, but only dispenses with the forfeiture and all the estate passes from the copyholder, and consequently cannot annex a condition; to which Popham agreed. — Ow. 72, 73. S. C. & S. P. held accordingly by Popham and Fenner; but Clench contra. — Noy. 171. Hart v. Arrowsmith, S. C.

[67] 7. Letters patents of *denization* made to an alien may be either upon condition precedent or subsequent, and so the king may make a charter of *pardon* to a man of his life upon condition. Co. Litt. 274. b. But one cannot be naturalized upon condition, because it is against the absoluteness, purity, and indelibility [indelibility] of natural allegiance. Co Litt. 229. a.

8. An *express manumission of a villein* cannot be upon condition, because once free in that case and always free. Co. Litt. 274. b.

9. If a *parson charges the glebe with a rent with consent of the ordinary*, this is not good without the assent of the patron that has the fee simple to make the charge perpetual; but seeing this assent of the

the patron is in respect of his interest, his assent may be upon condition. Co. Litt. 300. b.

10. An assignment of dower cannot be upon condition, nor an assent to a legacy; an admittance of a copyholder cannot be upon condition. In these cases the condition is void.

(N) To what things Conditions may be annexed.
[And How. pl. 1.]

[1. *F* Eoffment of two acres upon condition, and for breach that he may re-enter but in one, this is good. D. 3. Ma. 127. 55.]

[2. A tenth may be granted by the clergy to the king upon condition. 21 E. 4. 46.]

[3. If a copyholder surrenders to the lord * to do his will, upon condition that he shall pay to him 10l. this is a good condition.] Fol. 413.

* See (L) pl. 2. and the note there.

[4. A contract may be upon condition. 44 E. 3. 28.]

As in debt for a house sold to the defendant for 10l. who said that it was sold for 10l. and that the plaintiff should pull it down and carry it to him, and that then he would pay the 10l. and said that he was at all times ready to pay in case the other would pull it down and carry it; by which the other said, that the bargain was simple, and the other e contra. Br. conditions, pl. 28. cites 44 E. 3. 27, 28.

5. Matter of record may go upon condition sometimes. Br. Con- As charter of pardon granted ditions, pl. 236.

sometimes upon condition, Ita quod fiat rectus in curia &c. and consuance of plea is granted ita quod clerici fiat inde iustitia alioquin redeat, &c. Br. conditions, pl. 236.

And consulation was granted upon prohibition, upon condition that it should not be prejudicial to the presentation of the king. Ibid.—Br. consulation, pl. 10, cites 43 E. 3. 8. P.—Br. spoliation, pl. 5. S. P. cites 43 Aff. 35.

(O) How to be created [and pleaded.]

[1. *A* Condition of an obligation is good, if it be wrote upon the Justice back. 41 E. 3. C. 10. b. Charlton said, he did

not know but a man might make an obligation in a letter if he puts his hand and seal to it. Vern. 114. Mich. 1682. in the case of Moore v. Hart.—S. P. notwithstanding that it be not the deed of the obligee; but contra, if the condition be tack'd to the obligation, per Thorpe and Kirton, quod non negatur. Br. conditions, pl. 19. cites 41 E. 3. 16. [so is the large edition, but the smaller editions, are 41 E. 3. 10]—Fitzh. Barre, pl. 196. [but misprinted 186.] cites 8. C. & S. P. admitted.—Br. Fairs, .l. 7 cites S. C. & S. P. by Thorpe and Kirton.—See tit. fairs. (G) per totum.—See tit. indorsement:

[2. A condition to perform a matter in fact, without writing, is [68] good. 11 H. 6. 25. b.]

[3. As in an indenture a man may bind himself upon condition, to perform all the covenants between them made for the permutation of a benefice of which there is no writing. 11 H. 6. 25. b.]

[4. So if the obligation be indorsed upon condition to stand to the award of J. S. this is good, 11 H. 6. 25. b.]

5. A

S. P. Br. [5. A man may *aver* a lease for years to be upon condition
monstrance and plead the condition without shewing the deed thereof, because
acc. pl. 31. it is but a chattel. 7 H. 4. 11. Hill. 15 Car. B. R. between Potter
cites 7. H. 4. and Oldreeme, adjudged upon a demurrer, but not moved to the
36.—Tho' a man can't in any action court. Intratur Mich. 15 Car. Rot. 375.

plead a condition concerning a freehold, without shewing writing of this; yet he may be aided by the verdict at large in assise of novel disseisin, or in any other action where the justices will take the verdict of 12 jurors at large. As if a man seized in fee leases to another for life without deed rendering rent, and for default of payment a re-entry &c by force whereof the lessee is seized as of freehold, and after the rent is behind, by which the lessor entreth, and lessee arraigns an assise of novel disseisin, lessor pleads that he did no wrong or disseisin, and upon this the assise is taken; in this case the recognitors of the assise may give their verdict at large, as to say, that the defendant was seized of the land in his demesne as of fee, and so seized let the same land to the plaintiff for life, rendering such a yearly rent payable at such a feast, &c. upon such condition, that if the rent were behind at any such feast at which it ought to be paid, then it should be lawful for the lessor to enter &c by force of which lease the plaintiff was seized in his demesne as of freehold, and that afterwards the rent was behind at such a feast &c. by which the lessor entered into the land upon the possession of the lessee and prayed the discretion of the justices if this be a disseisin or not; therefore because it appears, that this was no disseisin to the plaintiff, inasmuch as the entry of the lessor was congeable, the justices ought to give judgment that the plaintiff shall not take any thing by his writ. And so in such case the lessor shall be aided, and yet no writing was ever made of the condition; for as well as the jurors may have consufance of the lease, they also may have consufance of the condition which was declared and rehearsed upon the lease. Litt. S. 366.—And so 'tis of a feoffment in fee, or gift in tail upon a condition, altho' no writing were ever made of it. Litt. S. 367.

See tit. fairs [6. (So) a man may plead, that a lease for years of land, or a
acc. (M. 2) grant of a ward, was made by guardian in chivalry upon condition
per totum. &c. without shewing any writing of the condition, because it is
but a chattel real. Litt. S. 365.]

* It should [7. So it is of chattels personal and contracts personal. Litt. S.
be S. 365. * 165.]

[8. If a condition have false Latin in it, yet if any sense may be intended in it by the words within the condition, it shall be good. 20 H. 6. 32.]

(P) How it may be created.

Br. verdict, [1. IF a man grants a rent for life, a condition cannot be an-
pl. 64. cites nexed to this unless it be by deed. 33 Aff. 2. Curia.]
S. C. and
S. P. admitted.—Fitzh. Verdict, pl. 42. cites S. C. & S. P. admitted,

Fitzh. assise, [2. If a man agrees with me to make a feoffment to me upon con-
pl. 311. cites dition, and after makes a charter of feoffment without any condition,
S. C. and after makes livery secundum formam chartæ without any condi-
[69] tion, this is absolute without any condition, for the livery is not made
according to the agreement, but according to the charter. 34 Aff.
1. Dubitatur.

(Q) Condition in deed. How.

Br. condi- [1. A Corody granted for life secundum quod prius per J. H. &
tions, pl. 167. alios usitat' fuit; and avers the use to have been, that every
cites 22 E 4. one that bath it shall attend upon the majster four times in the year,
otherwise

Conditions.

69

otherwise shall forfeit it; this is a good condition which refers to other matters, though not shewed in certain that they were done. 20 E. 4. 12. 18. b. 17 S. P. admitted.

[2. If an annuity be granted *pro consilio*, & auxilio habendis, and does not mention in what matter it shall be, yet it may be averred he was a physician, or a man of the law, and it was granted for his counsel and aid therein. 41 E. 3. 6.] Tho' the deed does not make mention what counsel or aid he

shall give, yet when he avers that the plaintiff is a physician, it shall be intended to be in such a thing in which the plaintiff has most skill, by which the plaintiff said, that the annuity was granted to resign such a benefice; quare if he may aver other cause than is expressed in the deed of a thing which cannot pass but by deed; and it was agreed that the demand of consilio & auxilio is not double; quod nota; but the principal case was not adjudged. Br. annuity, pl. 7. cites 41 E. 3. 6. 19.—Fitzh. annuity, pl. 19. cites S. C.

[3. So if the grantee be learned in two sciences, yet he may aver the grant was for one in certain. 41 E. 3. 6. b.] Fol. 414.

(R) How it may be created. In what Cases without Deed. And in what not.

[1. *A* Condition cannot be reserved without deed *indented*. D. 2. 3. See (O) pl. 5. 6. 7. (P) pl. 1.—A

condition may be without deed by livery. D. 127. 2. pl. 52.—If a man makes a deed of feoffment to another, and in the deed there is no condition &c. and when the feoffor will make livery of seisin unto him by force of the same deed, he makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passes by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had been made. Litt. S. 359—In this case the feoffor, upon the delivery of seisin, must express the estate as to him and his heirs, or to the heirs of his body &c. Co. Litt. 222. 6.

2. It was in a manner agreed, that a condition may be implied, tho' it be not precisely expressed in the deed, as in the case of a parker, that at all times after the grant he shall preserve the game. Br. conditions, pl. 168. cites 22 E. 4. 28.

3. If a man leases land upon condition, or grants a ward upon condition, this may be pleaded without deed; but estate upon condition of franktenement cannot be pleaded without deed in a real action, nor personal, without shewing deed; per Vavisor; quod tota Curia concessit. Br. conditions, pl. 249. cites 11 H. 7. 21.

4. If an agreement be made between 2, that the one shall infeoff the other upon condition, in surety of the payment of certain money, and after the livery is made to him and his heirs generally, the estate is holden by some to be upon condition, inasmuch as the intent of the parties was not changed at any time, but continued at the time of the livery. Co. Litt. 222. b. [70]

(S). *A*

(S) *At what time it may be created.*

- Br. defeasance, pl. 11. cites S. C. because the right was extinguished before by the simple release. — Br. release, pl. 39. cites S. C. agreed per tot. cur. 122. cites S. C. — Fitzh. conditions, pl. 18 cites S. C. — Co. Litt. 236. at the bottom, S. P. — Br. conditions, pl. 103. — Fitzh. conditions, pl. 14 cites S. C. — Co. Litt. 236. at the bottom, S. P.
- [1. IF a disseisee releases to his disseisor all his right, and at a day after the disseisor by indenture grants that if he pays so much at a day certain, the release shall be void; this is a void condition as to revive the right to the disseisee. Br. conditions 115. * 43 Ass. 12. per Cur. † 44 per Cur. contra † 17 Ass. 2. contra 31. Ass. 2. adjudged; but quære dubitatur, 32 Ass. 11.]

If the condition had been in the same deed, or both

[2. But such a condition may well be created at the same time that the release was made, tho' it be by another deed. Br. conditions 115. 32 Ass. 11. * 43 Ass. 44.]

deeds had been deliver'd together with condition to revoke the release, it was not denied but that it had been good. Br. conditions, pl. 115. cites 31 Ass. 32. — Br. conditions, pl. 122. cites S. C. and thereby Penrose and Perle held a release may be upon condition well enough, if it be contained in the same or another deed delivered at the same time with the release; quod affirmatur per Curiam, and not denied. — Fitzh. conditions, pl. 18. cites S. C. — Br. conditions, pl. 103. cites 17 Ass. 2. S. P. accordingly. — Br. release, pl. 39. cites 43 Ass. 12. S. P. by Tresilian and Wich; quod Curia non negavit. — Br. defeasance, pl. 11. cites S. C. & S. P. — Co. Litt. 236. b. S. P. accordingly; for it is a maxim in law, quæ incontinenti sunt inesse videntur. — 2 Rep. 71. a. S. P. per Cur. and cites 17 Ass. 2. & 43 Ass.

3. In assise, the tenant pleaded in bar, that the ancestor of the tenant enfeoffed the ancestor of the plaintiff without deed, and delivered the seisin upon certain conditions contained in certain indentures made between the parties, and for the condition broken, he as heir entred; and it appears there that if the livery had been made simply, and after the indentures had been made upon the condition, the indenture had come too late. Br. conditions, pl. 110. cites 28 Ass. 1.

4. In assise a man made simple feoffment, and after by deed re-bearing it the feoffee granted to the feoffor, that if the feoffor pays 10l. by such a day, that the deed and feoffment shall be void. Per Tanks, defeasance cannot be of effect of lands which pass by livery, if the livery be not made as well upon the defeasance as upon the charter of feoffment, and the opinion of the court was with him. Br. conditions, pl. 113. cites 30 Ass. 11.

- * [71] 5. In assise the tenant pleaded release of the plaintiff of all his right made to him, then tenant of the land, and shewed the deed; the plaintiff said that the tenant, by the deed which he shewed, granted that if he paid 8l. to the defendant by such a day, the release should be void, and at the day he tender'd, and the other refused; and the opinion of the court was clear, that such defeasance made after the release cannot give power to the plaintiff to re-enter, because by the release the * right was in the tenant simply, and cannot be devested by the defeasance. Br. conditions, pl. 120. cites 43 Ass. 1.

be instead of 43 Ass. (1) — Br. condition, pl. 122. S. P. cites 43 Ass. 44 — Br. defeasance, pl. 9. cites 31 Ass. 16. — But if the indenture of defeasance and release had been delivered uno instanti, it would have been good, and have avoided the release. Br. defeasance, pl. 11. cites 43 Ass. 44. And the difference there taken is, that a defeasance made afterwards may be good as to things † executory, but

but not as to what are *executed*; as in case of a release of right it is extinguished immediately, and executed; but where a simple feoffment is made with warranty, and after feoffee grants that he will not vouch, this is a thing executory in futuro. So of a lease without impeachment of waste, and after lessee grants by another deed, that if he be impleaded he will not plead this deed, this is good. Ibid.—And *ibid.* pl. 9. Brooke says, that some are of opinion that such release of right shall not be avoided, unless the condition or defeasance had been expressed in the deed, or been delivered on condition contained in another indenture *uno instanti*.

† See S. P. a Saund. 48, where the reporter takes the same diversity, contrary to the opinion of Twissén, and cited Cro. E. 755.

6. In debt, where *recognizance or obligation is made simpliciter*, it can't be upon condition after; for condition can't be added to it after, but this ought to be by defeasance; for recognizance is a judgement, and judgement which is simple can't be conditional after; and it is contrary to the nature of a judgement to be conditional, by the best opinion, and in a manner for law. Br. Conditions, pl. 89. cites 36 H. 6. 3.

7. Rents, annuities, conditions, warranties, and such like, that are *inheritances executory*, may be defeated by defeasance made, either at that time, or at any time after; and so the law is of statutes, recognizances, obligations, and other things executory. — Co. Litt. 237. a.

(T) Condition precedent. What shall be said a Condition precedent, and what subsequent.—
[And Pleading.]

[1. IF I grant, that if you will go to such a place about my business you shall have 10l. this is a condition precedent. 3 H. 6. 7. b.]

[2. If I retain a man for 40s. to go with me to Rome; this is a Br. Count, condition precedent; for the duty commences by going to Rome. pl. 5. cites S. C. — Poph. 161. Arg. cites S. C. & S. P. and therefore he ought to shew that he went to Rome. — Bulst. 168. Arg. cites S. C. — 3 H. 6. 7. b. S. P.]

[3. So if a man retains another to be his counsel for 2 years next ensuing, taking every year 20l. This is a condition precedent. — Br. Count. pl. 5. cites S. C. — 3 H. 6. 33. b.] S. C. cited Arg. Bulst. 163.

[4. If A. by his will obligatory acknowledges, that he debt to B. 20s. and for payment thereof at a day binds himself in 40s. by the same bill, in an action of debt upon this bill for the 40s. he ought to aver, that A. did not pay the 20s. otherwise it is not good. Mich. 14 Car. B. R. between Daves and Brett, adjudged upon a demurrer.] Cro. C. 515. pl. 14. Bayns v. Brighton, S. C. per tot. cur. accordingly; for this is not an obligation with a condition.

[5. If by charter-party G. and 3 others covenant with P. and C. to let to freight a certain ship, of which they are owners, to the said P. pro. Bulst. 167. Clarke v. Gurnel 1 Ann. 934c.]

P. pro usu & ex parte of one B. for a voyage, modo & forma sequente. G. and the 3 others covenant and grant with B. that the ship shall go from Lynn and take such freight, and thence to Yarmouth, and thence to Cinchego, and thence return to the Thames; and C. covenants with G. and the other 3, that B. [P.] shall cause lading to be put in the ship at Yarmouth, Cinchego, &c. within so many days, and covenants that the said B. [P.] shall pay to the said G. and the other 3, pro tota transfratatione 147l. at such a day; C. and the other three may have an action of covenant against C. for non-payment of the said 147l. without averment of the performance of the covenants of their parts, for this is not a condition precedent, but covenants distinct of the other part. Mich. 7 Jac. B. between Gurnell and others against Clarke adjudged.]

what was to be done on the plaintiff's part; but the court not being full, the reversal was not pronounced, but adjourned to another time.—In this case it does not appear whether the money was to be paid before the voyage or after; but in writ of error in B. R. the judgment was held erroneous, as appears Bull. 167, per Holt Ch. J. Lutw. 251. Hill. 8 W. 3.—S. P. by Holt Ch. J. and says, that Roll reports the judgment in the Common Pleas, 7 Jac. but it seems had not seen the reversal thereof, which was 9 Jac. 2 years after, as it is in Bull. where it is judged that *pro tota transfratatione* is a condition precedent, and that its being in mutual covenants makes no alteration. 12 Mod. 463. Pasch. 13 W. 3. in case of Thorpe v. Thorpe.—Lord Raym. Rep. 665. Holt Ch. J. cites S. C. and says that as it is put in Roll, without setting forth at what time the day of payment was to happen, whether before or after &c. it can be of no great authority, and that it was reversed for this very reason, because *pro tota transfratatione* made a condition precedent, and cites Bull. 167.—S. C. cited accordingly by Holt Ch. J. Lutw. 251. in the case of Thorp v. Thorp.

The case of Thorp v. Thorp was an action brought in which the plaintiff declared, that the defendant had and held of him by way of mortgage 2 closes of copyhold land, and that there was a discourse between them concerning the plaintiff's releasing his equity of redemption therein to the defendant, and concerning divers sums of money due from the plaintiff to the defendant upon the said mortgage, upon which the plaintiff did agree with the defendant that he would release to him the said equity of redemption, in consideration of which the defendant did agree with the plaintiff to pay him 7 pounds above all that was due; and that, in consideration that the plaintiff promised the defendant to perform all of his side, the defendant promised the plaintiff to perform of his side, and avers that he did perform all on his the plaintiff's side, but that the defendant paid 11. 7s. of the said 7l. and no more, &c. To this the defendant pleads in bar, that long after the promise, viz. 29 July 1654, the plaintiff did, by indenture made between him and the defendant, release to the defendant all manner of actions, suits, debts, duties, sum and sums of money, and all demands whatsoever, which ever he had, or he, his heirs, executors, or assigns ever should have, for or by reason of any thing, matter, or demand whatsoever. Upon oyer of this deed of release, it did recite the said mortgage, and released all provisions therein and all his estate, right, title and interest in the said close, both in law and equity, and then follows the foregoing clause; and upon this the plaintiff demurs, and judgment for the plaintiff in C. B. and affirmed in B. R. 12 Mod. 455 to near 467. Pasch. 13 W. 3. Thorp v. Thorp.—Lutw. 245. 249. S. C. and judgment affirmed.—Ld Raym. Rep. 662. S. C. and judgment affirmed.—S. C. cited 8 Mod. 293.

+S. C. cited Arg. Bull. [6. If A. by indenture covenant with C. to serve him with 3 squires in the war, and C. covenants for this to pay to A. 42 marks, here (*) each hath an equal remedy, and therefore in debt for the 42 marks, the plaintiff may count generally or specially. + 48 E. 3. 3. b. Co. 7. Ugtrud. 10. b.]

168.—12 Mod. 461. Holt Ch. J. cites 48 E. 3. 2. 3. as cited in Ugtrud's case, where the diversity is taken, when there are mutual remedies, and when not. It is thus put in that book; Sir R. P. covenants with Sir R. T. to serve him with 3 squires in the wars of France; Sir R. T. covenants, in consideration of those services, to pay him so much money; and there it is said, action will lie for the money without any services performed. But the case in 48 Ed. 3. is, that R. P. covenants with R. T. to serve him with 3 squires in the wars of France, and R. T. covenanted with him to pay him so much money for the service; and it was further agreed, that 20 marks of the money should be paid in England at a day certain, before they went for France, and the rest by quarterly payments, which might likewise incur before the service, and upon action brought by Sir R. P. it was objected, that the service was not performed; but there was no room for that objection, the money, by the agreement, being made payable

payable at a day certain, before the service was to have been performed.—S. C. cited by Holt Ch. J. Ld. Raym. Rep. 665.—S. C. cited and denied by Holt, Ch. J. 1 Salk. 171. pl. 1.

Ugred's case has afforded a ground for a variety of opinions upon this question. Per Holt, Ch. J. 12 Mod. 462.—S. P. by Holt. Lutw. 251.—Ld. Raym. Rep. 665. S. P.

There is no pl. 7. in Roll.

[8. If by articles of agreement made between A. on the behalf of B. and C. by which A. covenants that B. *for the consideration after in the deed expressed, shall convey certain lands to C. in fee, and after C. covenants on his part pro considerationibus prædictis to pay to B. 160l. &c.* In this case, though B. does not assure the land to C. yet C. is bound to pay the money; for the assurance of the land is not a condition precedent, but these are distinct and mutual covenants. Mich. 15 Car. B. R. between *Caton and Dixon*, adjudged upon a demurrer. Intratur Car. Rot. 137.] [73]

S. C. cited by Holt Ch. J. 12 Mod. 463. who says that this case does not come up to the case of Thorp v. Thorp, because here is an express covenant, that (for the consideration hereafter expressed) B. would convey to C. and C. (upon consideration aforesaid) covenants to pay the money; that must be understood, that for as much as A. hath covenanted that B. should assure lands for consideration hereafter mentioned, that is, that B. hath covenanted to pay so much money, for it is pro consideratione prædicta; and the question is, what is meant by the words (pro consideratione prædicta)? 'tis not said for consideration of conveyance of the land, but pro consideratione prædicta, which must be understood in consideration of the agreement that B. should convey &c. for the one covenants for consideration hereafter mentioned, which must be covenant for payment of the money, and the other covenants for consideration aforesaid, which must be that A. covenanted that B. should convey.—Lutw. 251. S. C. cited by Holt Ch. J. accordingly.—Ld. Raym. Rep. 665, 666. S. C. cited by Holt Ch. J. accordingly.

[9. If A. releases to B. an obligation, in which B. is bound to him with a proviso that he, scilicet A. might have and enjoy 120l. due by J. S. to B. at Lady-Day next ensuing; this is a condition precedent, and not subsequent, because the 120l. was not due at the time of the release, but at a day to come; and if it should be subsequent, the condition would then be void, the release being of a personal thing. P. 10 Car. B. R. between *Barkely and Parker* adjudged upon a demurrer, per Curiam. Intratur P. 9 Car. Rot. 262.]

[10. If an award be made by arbitrators between A. and B. that A. shall pay 10l. to B. and that in consideration inde B. shall be bound in an obligation to A. to release all his right in certain land; in this case B. is obliged to be bound in the obligation though A. hath not paid him the 10l. though that is first to be done by the intent of the arbitrators, for there is a mutual remedy of each part, if the award is not performed, for the consideration was the only motive of the arbitrators to make the award, and it is not a condition precedent; between *Vivian and Shipping*, per Jones and Barkley against Croke, this being moved in arrest of judgment; But Hill. 11 Car. B. R. between † *Hayes and Hayes*, the same case in effect was adjudged upon a demurrer, that is not any condition precedent; but that B. is bound to perform his part, though A. does not perform his part. Intratur Hill. 10 Car. Rot. 1045. Contra M. 10 Car. B. R.] * S. C. cited by Holt Ch. J. 12 Mod. 463. and observes that Roll himself says the court were divided; and says that Cro. C. 384. gives a quite contrary report of the case, and says that Jones and Bark-

ley held it a condition precedent, contra Croke, and therefore Holt says that he rather believes Croke, who was one of the judges, and tells you himself he was of a contrary opinion.—S. P. by Holt, Lutw. 252. accordingly.—S. P. by Holt accordingly. Ld. Raym. Rep. 666.

† As to the case of *Hayes v. Hayes* Holt Ch. J. says 12 Mod. 463. and Lutw. 252. and Ld. Raym. Rep. 666. that the S. C. is reported Cro. C. 384. but that there is no such point in it.

Condition.

[11. If a man by his last will *devises* any thing, &c. and after he *devises all the residue of his estates*, &c. to his executor *after his debts paid*, and funeral expences discharged, this is a good condition precedent; so that the executor cannot have it before they are paid and discharged. Hill. 10 Car. B. R. between *Wilkinson and Merdam*, per Curiam, upon a special verdict adjudged; But in a writ of error, as I have heard, this was a doubt between the judges, and they inclined to reverse it. Hill. 7 Car. B. R. between *Briscoe and Baker* adjudged upon a special verdict, where the devise of land was to a woman, his debts and legacies first paid, and his funeral expences discharged.]

[74]
Jo. 389. pl. 10. S. C. adjudged accordingly, and judgment in C.B. affirmed—
Win. 103 to 109. and part thereof, and 115 to near the end of 120.
* Fol 416.
Mich. & Hill. 22 Jac. C. B. the arguments of the serjeants in the case of *Cooper v. Edgar*. S. C. cited 3 Lev. 132. and judgment accordingly, Trin. 35 Car. 2. C. B. in the case of *Edwards v. Hammond*. —
S. C. cited 2 Show. 398. pl. 370. and held accordingly, Mich. 36 Car. 2. B. R. in case of *Stocker v. Edwards*; but seems to be S. C. with that in 3 Lev. [See Tit. remainder (L) pl. 13. S. C.]—(F. a) pl. 1. S. C. but not S. P.
[12. If A. tenant for life, and R. in reversion in fee, covenant, and to levy a fine, and that it shall be *to the use of A. and his Heirs, if R. does not pay 10s. to A. the 10th of September after; and if he does pay, then to the Use of A. for Life, and after to the Use of R. in Fee.* In this case this word (if) &c. is a condition subsequent, and not precedent, so that A. hath an estate in fee till R. pays the 10s. because there is a day limited for payment of the 10s. and the subsequent words explain the intent to be a subsequent condition, scilicet, and if he pays it, then it shall be to A. for life, and after to the use of R. in fee, which shews the intent to be, that A. shall have an estate in fee till the 10s. paid. Tr. 13 Car. B. R. in a writ of error, upon a judgment in Banco, between *Spring and Caesar*, (*) the last Master of the Rolls, per totam Curiam adjudged, and the judgment given in Banco affirmed, where it was adjudged accordingly. Intratur Mich. 11 Car.]

S. C. at Tit. Arbitrement (K) pl. 17. but S. P. does not appear.
[12. [bis] If the condition of an obligation be to stand to the award of J. S. *Ita quod fiat de & super premissis by writing under the hand and seal of the arbitrators, and published and ready to be delivered to the parties before such a day*; all this is a condition precedent; for if it be not in writing under the hand and seal of the arbitrators, and published before the day, and also though it be made and published, yet if it be not ready to be delivered to the parties before the day, it is not a good award. Mich. 16 Car. B. R. between *Burbridge and Raymond*, adjudged in a writ of error, and the judgment given in Banco reversed, because he did not aver that it was made under the seal of the arbitrators, and published before the day. Intratur Tr. 15 Car. Rot. 1657.]

[13. Mich. 15 Car. B. R. between *Capps and Penny*, per Curiam, where he averred, that it was *ready to be delivered* to the parties before the day, for it might be that he made it but kept it secret; and for this cause judgment was arrested after a verdict for the Plaintiff.]

See Tit. Arbitrement (D.) pl. 22. and the notes there.
[14. Tr. 1649. between *Conduit and Damper* adjudged, where the condition being to stand to the award of J. S. *Ita quod arbitrium by deed indented under the hand and seal of the said J. S. be ready*

ready to be delivered to each of the parties before such a day, &c.; and the plaintiff in an action upon the obligation for non-performance of the award pleads in his replication, *that J. S. such a day*, which was before the day aforesaid, before which it ought to be made by the condition, *accepto super se onere arbitri predicti per quoddam scriptum indentatum, quod idem querens sub manu & sigillo predicti J. S. signatum, & utrique partium predictarum deliberari paratum hic in Curia profert, cujus datum est eisdem Die & anno arbitratus fuit, &c.* this is not good; because as this is alledged, it does not appear that the award was made under the hand and seal of the arbitrator, and ready to be delivered to the parties before the day, as it ought to appear, or otherwise it is not good; for the word (so) disjoins the sentence that it is to be intended, that when it was shewn in court, it was under the hand and seal of the arbitrator, and ready then to be delivered to the parties. Adjudged it is not good. Intratur Hill. 24 Car. Rot. 636. And the record of *Burbridge's Case* before-mentioned was shewed to the court, which was all one with this, and judgment there given accordingly as here.]

[15. If *A. leases by indenture a messuage to B. in December, 22 Car. Sty. 140,* for 12 years, and covenants with B. to repair it with all necessary ^{141. S. C.} reparations before *Midsummer following*, and B. covenants of his ^{Roll Ch. J.} part, *quod ab & post tale tempus quale A. repararet & emendaret præd-* ^{held it a re-} ^{ciprocal} *mesuagium quod tunc predictus B. sufficienter repararet prædictum* ^{covenant,} *mesuagium ad omnia tempora durante dicto termino*; in an action of co- ^{but Bacon J.} ^{e contra, &} ^{adjournatur.} [—] ^{Lessee} ^{covenanted} ^{quod ab &} ^{post repara-} ^{tionem &c.} ^{by the les-} ^{for &c. he} ^{would keep} ^{the same in} ^{repair, and} ^{leave them} ^{so at the end} ^{of the term.} ^{In covenant} ^{the plaintiff} ^{Fol. 417.} *venant by A. against B. for not repairing the messuage after Midsum-* *mer, according to the covenant of B. and declares, that altho' he hath* *performed all the covenants of his part to be performed (without any* *particular averment that he hath repaired before Midsummer accord-* *ing to the covenant, with all necessary reparations) yet the defendant* *hath not repaired it after the said feast &c.* this is a good declaration; for the covenant of A. to repair it before Midsummer is not a condi- tion precedent, but only the time divided, and mutual between A. and B. scilicet, that A. shall repair it before Midsummer, and B. after, du- ring the term, for which each of them may have their remedy by an action against the other, for the ultimate time limited for A. to repair is Midsummer, and the covenant of B. refers to the said extreme time limited to A. and not to the fact, scilicet the reparation; for the (*) words are *post tale tempus &c.* Pasch. 1649. between *Bragg and Nightingal*. Intratur Tr. 24 Car. B. R. Rotulo 601. adjudged upon a demurrer per Curiam.]

house, parcel of the premises at the time of the demise was in good and sufficient repair, and that the defendant voluntarily, during the term, suffered it to stand uncovered for a year, whereby it became very ruinous and fell down. The whole court (absente Lea) held, that though it was in good repair at the time, yet that is not sufficient, nor shall the covenant be construed to extend to such of the buildings only as then wanted repairs; for if any were in good repair in the beginning, and happen afterwards to decay, the plaintiff must first repair it before the defendant is bound to do it. Cro J. 645. pl. 7. Mich. 20 Jac. B. R. Slater v. Stone. — And though one of the out-houses which the covenant extended to, was in good repair, and the lessee pulled the same down, this is not within the covenant, unless the lessor had repaired it first; but his true remedy would be by action of waste. 2 Roll Rep. 248. A. C. — S. C. cited by Chamberlaine J. 2 Roll Rep. 348.

16. The word *paying* makes subsequent condition. Arg. Mo. 363. cites 38 E. 3. 11. and 12. devise of land to K, so that he may pay my debts,

debts, viz. 10l. to A. and 12l. to B. the payment ought to be upon request and subsequent and cites 5 E. 6. Br. Estates 78.

17. Condition to resign a living by such a time for a certain pension to be conveyed to the parson, makes the conveying the pension a condition precedent. Arg. 10. Mod. 223, cites 14 H. 4. 19.

The plain-
tiff's testa-
tor devised a
term to J.
W. and if A.
his wife suf-

18. Note per Cur. that where a man makes 2 executors, and that if they refuse that then such and such &c. there the 2 last are not executors but in default of the 2 first; for these words imply a condition. Br. Conditions, pl. 10. cites 3 H. 6. 6.
ferred: he devisee to enjoy it 3 years, that she shall have all his goods as executrix; but if she disturbs him, then he makes G. J. his son executor, and dies; A. as executrix brings an action of debt within the 3 years; adjudged, that she was executrix till she disturbed, and that the plea of the defendant that she had made a disturbance was not good without particularly alleging how she disturbed. Cro. E. 219. pl. 7. Hill 33 Eliz. B. R. Jennings v. Gower.—Tho' in grants estates shall not be till the condition precedent be performed, yet it is otherwise in a will; for a will shall be guided by the intent of the party; and in the principal case it shall not be construed as a condition precedent, but as a condition to abridge her power to be executrix if she does not perform it; per justiciarios. Ibid.—Le. 229. pl. 311. S. C. adjudged accordingly by all the justices, tho', according to both the reports, Anderson at the first was of a contrary opinion.—S. C. cited by the name of Jennings v. Cawman. Win. 115.

[76]

* This is mis-
printed and
should be 3
H. 6. 33. b.
pl. 26.

19. A condition precedent is traversable; per Cur. Noy 75. Hill. 1 Car. B. R. cites 3 H. 6. 33. 48 E. 3. 34. 9 E. 4. 3. b.

20. There is a diversity where the condition is precedent and where subsequent; for when it is precedent it is not in the grantee till the condition be performed; but when the condition is subsequent the thing is in the grantee till the condition be broken. Br. condition pl. 67. cites 14 H. 7. 17. per Brudnel.

21. As where I grant to you, that if you will marry my daughter that you shall have such a lease, or such land for 20 years, now you shall not have the land or lease before you have married my daughter; but if I lease to you my land for 20 years upon condition that you pay to me 10l. by such a day, now the lease is in the grantee till the condition be broken. Ibid.

Br. covenant
S. 22. cites
S. C.—
A man hired
another for a
year; it was
agreed on all
sides, that
the person
thus hired
could have
no action for
his wages
till the year
was expired;

22. If A. covenants with B. to serve him for a year, and B. covenants with A. to pay him 10l. there. A. shall maintain an action for the 10l. before any service; but if B. had covenanted to pay 10l. for the said service, there A. could not maintain an action for the money before the service performed. And there is great reason for this diversity; for when one promises, agrees, or covenants to do one thing for another, there is no reason he should be obliged to do it till that thing for which he promised to do it be done; and the word (For) is a condition precedent in such cases. Per Holt Ch. J. 12 Mod. 460. cites 15 H. 7. 10. pl. 17.

but if the master had covenanted to pay it on a certain day within the year, in such case an action would lie before the year was ended. 8 Mod. 41. Pasch. 7 Geo. 1. cited per Cur. as a case in the time of the Ld. Ch. J. Holt.—See Tit. apportionment (A).

Win. 116.
Arg. cites it
as agreed in
the case of
Jennings v.
Cawman,
that the

23. Lands were leased to A. and M. his wife for life, remainder to B. their son for his life, si ipse (B) inhabitare vellet, & residens esset infra predictam grangiam & firmam &c. This is not a precedent but only a subsequent condition. Pl. C. 23. a. Pasch. 4 E. 6. Colthirst v. Bejushin.

words, & ipse inhabitaret are a subsequent condition, as in the case of Colthirst, because it is a thing of continuance which may be infringed and broken every year.

24. When an interest or estate should be reduced to a certainty upon condition precedent, and the lessor or grantor, and the lessee or grantee die before the contingent happens, the lease or grant is void; as if a lease be made for so many years as my executors shall name; this is void, for it ought to be reduced to a certainty in the life of the parties; And note, a good diversity between a covenant or other agreement which is perfect and certain, and tho' if it be to take effect in possession, upon a future matter precedent, and a covenant and agreement, uncertain which is to be reduced to a certainty by future matter ex post facto; for in one case the interest or estate of the lands is bound immediately, and in the other not. 1 Rep. 155. b. in the rector of Chedington's case, cites Pl. C. 273. b. [Pasch. 6. Eliz.] Say and Fuller, and says that in the one case the interest and estate in the land is bound, but not in the other.

25. When a man is to have one thing for the cause of another he must allege the thing for which he is to have it; Arg. cites many cases. 3 Le. 39. pl. 63. Arg. Mich. 15 Eliz.

1 Salk. 112.
Trin. 2 Ann.
S. P. but
time fix'd for
payment will

vary the construction. Before Holt, Ch. J. at Guildhall, Callonel v. Briggs.

26. A. leased for life upon condition, that if the lessor died without issue, then the lessee to have fee; the lessor is attainted of treason by 1 H. 7. and all his lands forfeited to the crown saving the right of * strangers, and then dies without issue, and afterwards an office is found; and adjudged, that the lessee had the fee. Plow. Com. 481. Mich. 17 and 18 Eliz. Nicholls v. Nicholls.

Tho'the Re-
version is re-
moved out of
the person of
the lessor,
and out of
his blood, by
his grant
execut or

other cause: yet this shall not hurt the lessee when the condition is performed; for the fee shall vest in him, and he be discharged of all rents, recognizances, conveyances, or other incumbrances made by the lessor after the condition first made, or coming under the lessor, or under the condition, or under felony or treason, or other thing done by him, and all shall be bound whether they be strangers or privies in blood; by the justices. Plow. 436. 8. Mich. 17 and 18 Eliz. Nichols v. Nichols.

* [77]

27. A. levied a fine to B. and his heirs upon condition, that if he pay 10 l. to A's son when he comes to the age of 18 years, then to the use of B. and if not then to A. and his heirs. The son died before the day, and the opinion was, that B. should have it; cited per Finch serjeant, Arg. Winch. 119. to have been adjudged 18 Eliz. in C. B.

28. A. makes lease for years to B. proviso quod non licebit to B. to alien his term without assent of A.—B. devised the term to his son, the lessor assenting to it; as this case is, 'tis no breach of the condition, for nothing passed till A's assent be obtained, for 'twas a condition precedent; and though the devisee entered by the consent of the executor, and had not A's licence, yet 'tis not material. Cro. E. 60. pl. 2. Mich. 29 and 30 Eliz. B. R. Knight v. Mory.

29. The lord of a manor covenanted with his copyholder, to in- franchise his copyhold, and the copyholder, in consideration of the same performed, covenanted to pay 100 l. The whole court held, that he is not obliged to pay the money before the assurance made; but if the words had been in consideration of the said covenant to be per-

2 Le. 211.
pl. 261.
Trin. 29
Eliz. C. B.
Broccus's
Case, S. C.
in the same
words.

formed, he must pay the money presently, and take his remedy over by covenant. 3 Le. 219. pl. 290. Mich. 30 Eliz. B. R. Brocas's case.

30. Tho' the law is strict against estates at common law which are to arise upon conditions precedent that never are performed, yet 'tis not so in limitations of uses where the intent is to guide the estate, no more than 'tis in devises. Arg. Mo. 519. cites it adjudged, 31 Eliz. in lord Paget's case.

Le. 229. pl. 311. Patch. 31 Eliz. C. B. the S. C. S. P. 31. Tho' in grants estates shan't be till the condition precedent be performed, yet 'tis otherwise in a will, for the will shall be guided by the intent of the party. Cro. E. 219. pl. 7. Hill. 33. Eliz. B. R. in case of Jennings v. Gower.

7 Rep. 9. b. Trin. 31. Eliz. C. B. Ughtred's case. 32. A. grants an annuity to B. for life, for maintaining a castle; In annuity brought upon this grant, the plaintiff need not shew in his declaration that he has maintained the castle; for it is a condition subsequent, (as where an annuity is granted pro consilio impendendo) and the estate is vested. Jenk. 260. pl. 59.

7 Rep. 10. b. S. P. per Cur. accordingly, for it is by the performance of the consideration that the duty commences, and so it is in nature of an act precedent, and says that so was the opinion of the court in 3 H. 6. 336. S. P. accordingly by Hobart Ch. J. Hob. 41. & 106.—Poph. 198. Arg. S. P. cites 15 H. 7. by Fineux.—See Tit. Apportionment (A) per tot.

33. But where a man retains a servant by the year, for a salary, in debt for this salary the plaintiff should declare, that he has done his service, or tendered; for this is an action which ought to aver a consideration; but not where the covenants are reciprocal, the one to serve the other to pay, for they have mutual remedies. If the condition be precedent, the performance of it ought to be shewed in the declaration. Jenk. 260. pl. 59.

34. A. devised a house to B. and if B. die before C. then I will that C. shall have it upon such composition as shall be thought fit by my executors, allowing to my executors such reasonable rates as shall be thought meet by my overseers. A. died. B. died. Agreed that the estate to C. is precedent and the condition subsequent, and that the overseers might make agreement with C. at any time. Cro. E. 795. pl. 42. Mich. 42 & 43 Eliz. C. B. Woodcock v. Woodcock.

[78] 35. Devise to A. for life, if B. within 2 years after devisor's death do bind himself in 100 l. to pay 5 l. per ann. to A. during his life, and if B. binds himself then he devised it to B.—A. dies within 2 months, no bond given by B. Agreed, that the remainder to B. on this condition precedent is good, because the condition is discharged by the act of God. Mo. 758. pl. 1049. Trin. 2. Jac. Foster v. Brown.

36. If a condition precedent be impossible, no estate or interest shall grow thereupon. Co. Litt. 206. a. b.

37. If the condition be to increase an estate, i. e. to have the fee upon payment of money to the lessor or his heirs at a certain day, and before the day the lessor is attainted of treason or felony, and dies before the day is executed. Now is the condition become impossible by the act and offence of the lessor; yet the lessee shan't have fee, because a precedent condition to encrease an estate must be performed,

formed, and if it become impossible, no estate shall arise. Co. Litt. 218. a.

38. A. makes a lease to B. if C. lives for 21 years, and C. is dead at the time; this lease is void, for the condition is precedent. Jenk. 305. pl. 79.

39. A positive agreement was, that one shall deliver a cow to the other, and that the other shall give him so much money; the action lies for either side without performance of his promise. 12 Mod. 460. cited by Holt, Ch. J. as Hob. 88. [pl. 117. Hill. 12 Jac. Nichols v. Rainbred] and agrees the case to be good law. *But if by the agreement A. were to deliver B. a cow, and that for it B. were to deliver*

him a horse, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A. can bring his action; and upon this diversity the books are reconcileable. Per Holt Ch. J. 12 Mod. 460. Paich. 13 W. 7.

40. The executor of A. brought an action of the case against B. declaring, that in consideration that A. in his life-time did promise to assure certain lands to B. before Michaelmas next, B. promised to pay him so much money for the land; so that the assurance was to be made before Mich. and the money was to be paid for the land, and consequently after Mich. For A. had time till Mich. to make the assurance; and because the assurance was to have been made first, and the money by the agreement to be paid for the land, though there were mutual promises, yet it was adjudged the action would not lie for the money, without making the assurance first; cited by Holt Ch. J. in delivering the opinion of that court, 12 Mod. 462. as Jo. 318. [pl. 27. Mich. 5. Car. B. R. *Russel v. Ward*] and says, that this case as it is there reported is intricate, and requires consideration to make this construction upon it; but upon examination it is a full authority in point. *S. C. cited by Holt Ch. J. in delivering the opinion of the court, Lutw. 251. --Ld. Raym. Rep. 665. S. C. cited by Holt Ch. J.*

41. The husband devised his lands to his wife for life, and made her executrix, and devised further, that if it should fully appear that his goods and chattles were not sufficient to pay his debts, &c. that then she should sell all his lands, or so much thereof, which together with his goods, &c. would satisfy his debts, &c. Adjudged this is a precedent condition to the sale of the lands, and therefore the amount of the debts, &c. and the value of the goods ought to be set forth, and aver that they were not sufficient to satisfy the debts, that thereby the court may judge whether the condition is performed or not. Jo. 527. pl. 9 Car. B. R. *Dike v. Ricks*. *Cro. C. 335. pl. 21. S. C. adjudged accordingly.*

42. The plaintiff covenanted to raise soldiers, and bring them to such a port, and the defendant covenanted to find shipping and victuals for them to transport them; plaintiff brought his action for not providing shipping, &c. at the time appointed; the defendant pleaded that the plaintiff had not raised the soldiers at that time; Roll Ch. J. and Ask held, that these words were mutual and distinct covenants, but Jerman and *Nicholas J. held it a precedent condition, but afterwards Nicholas chang'd his opinion, and so judgment for the plaintiff, Nisi. Sty. 186, 187. Hill. 1649. *Ware v. Chappel*. **[79] S. C. cited 2 Mod. 34. by Ellis J. and said he thought it a very hard case, that the plaintiff who never raised any soldiers may bring his action upon this promise*

against the defendant for not transporting them.—S. C. cited by Holt Ch. J. Lutw. 255. and said, that he did not think as Ellis J. did, that this was a hard case, but a plain case.—S. C. cited per Holt Ch. J. 12 Mod. 465. in the case of *Thorp v. Thorp*, and says, that this differs from that case; *64*

for in this case 2 distinct acts are to be done, the one is to be ready with soldiers, and the other with ships, and the performance of the one does not depend on the other, nor is the doing of the one the reward for doing of the other; but they are distinct acts, and each is to do his part; and this is not a hard case, for they are mutual acts not depending the one upon the other.—S. C. cited per Holt, *Ld. Raym. Rep.* 666, 667. accordingly.

43. A. in consideration that B. should forbear to protest a bill of exchange drawn upon A. promised *he would pay the money when he came next to London*; issue joined and verdict for the plaintiff. It was moved in arrest of judgment, that here is no consideration set forth to ground the promise upon; for B. does not shew that A. came to London, but shews, that *A. died at Plymouth and came not to London*; per Roll. Ch. J. the coming to London is alleged to no purpose, for the payment of the money was a duty, and the monies to be paid were received beyond sea, and so is a duty and made a good consideration; judgment affirmed. *Sty.* 416. *Hill.* 1654. *Pinchard v. Fowke.*

44. A lease was made paying so much; (*paying*) does not make precedent condition. *Sid.* 280. pl. 8. *Paſch.* 18 *Car.* 2. *B. R.* *Allen v. Babington.*

B. C. cited 45. A. seised of lands in fee in 1643, conveyed them to trustees, *Arg. Mod.* and their heirs upon trust, that if B. his eldest son within 6 months after A's death, secured 500 l. to the trustees for the benefit of B's children, then the trustees (after such security first given) to convey to B. and his heirs, and till the 6 months the trustees to stand seised to the use of B's eldest son, and for default of such security, the trustees, at the request of B's eldest son, to convey to him. Afterwards, in 1656, B. being in possession, and taken to be absolute owner of the lands, mortgaged the land for 2000 l. Afterwards B. died without having given any security; the court decreed, that the mortgagee should hold the land for security of the 2000 l. and interest against the trustees and the eldest son of B. and all claiming under them, but charged with the 500 l. and upon a bill of review Lord Keeper Bridgman said, he saw no cause to reverse the decree; but looked on the condition precedent to be *in nature of a penalty*, and would regard the *intent of the trust*, which was to secure 500 l. to the younger children, which according to the way the trustees and B's eldest son went, could not be; and so dismissed the bill of review. *Chan. Cases* 89. *Trin.* 19 *Car.* 2. *Elſton, Wallis & al' v. Crimes & Scot.*

Lev. 274. 46. An agreement in writing between the parties that A. should *Mich.* 21 pay 500 l. to B. for all his lands, in witness &c. This agreement *Car.* 2. *B. R.* was mutually executed, and afterwards B. brought debt for the *the S. C. ad-* 500 l. without averring conveyance or tender. Adjudg'd, that *judg'd and* after the day for the conveyance was past the action lay for the *affirm'd in* money, because it was a mutual agreement on which either party *Cam. Scacc.* has a mutual remedy; but it is otherwise where the preposition *—Saur.* *pro* makes it a condition precedent, and the court held it would have *319. 320.* been otherwise in the last case if it had been the deed of one of the *S. C. ad-* parties. 8 *Mod.* 42. cited per *Cur.* as the case of *Portage v. Cole.* *judg'd, and* *judgment* *affirm'd —* *Raym.* 183. *S. C. adjudg'd.*—*Sid.* 427. *S. C. adjudg'd.*—2 *K. b.* 542, 543. pl. 5. *B. R.* adjudg'd per tot. *Cur.*—*S. C.* cited by Holt Ch. J. in delivering the opinion of the court. *Lutw.* 251. And *Ld. Raym. Rep.* 665.

47. Plaintiff covenants not to use the trade of a taylor with any customers in a schedule mentioned, and defendant covenants in consideration of performance thereof to pay 100l. per annum quarterly, this is in nature of a negative covenant, viz. not to use &c. and, therefore if the words in consideration &c. shall amount to a condition precedent, the plaintiff shall never have the 100l. per annum during his life, because such negative covenant cannot be said to be performed while there is a possibility of breaking it, which may be done at any time during his life, and death only can make it impossible, so that these are mutual covenants. 2 Saund. 155. Trin. 22 Car. 2. Hunlock v. Blacklow.

Mod. 64.
pl. 8. S. C.
adjudg'd nisi.
—Sid. 464.
pl. 10. S. C.
the court
held them
to be mu-
tual cove-
nants, and
judgment
for the
plaintiff.—
2 Keb. 674.
pl. 48. S. C.
adjudg'd accordingly.

48. In covenant &c. the plaintiff declared upon articles of agreement, by which the defendant covenanted to pay the plaintiff so much money, *he making to him a sufficient estate* in such lands before Michaelmas, &c. and though he (the plaintiff) *semper a tempore confectionis scripti paratus fuit ad performand' usque ad diem exhibitionis billæ* all the agreement on his part, the defendant had not paid the money. It was held, that the words (he making a good and sufficient estate) are a condition precedent, and therefore the plaintiff should have averr'd the performance of it particularly, and not by such general words as, that he had performed all on his part. Vent. 147. Trin. 23 Car. 2. B. R. Large v. Cheshire.

2 Keb. 801.
pl. 45. S. C.
adjudged ac-
cordingly.—
S. C. cited
Lutw. 251.
and Ld.
Raym. Rep.
665. by Holt.
Ch. J.

49. Plaintiff agreed to assign a term of 80 years to the defendant, who proinde should pay 250 l. and then lays mutual promises; and upon a demurrer it was objected, that this was a condition precedent, and therefore the plaintiff ought to have averred a performance; for the plaintiff was to assign, and the defendant proinde, viz. pro assignatione, is to pay the money; but the court præter Atkins J. who doubted, held it not a condition precedent, but a mutual promise; for it is as reasonable the plaintiff should have his money before the assignment made, as 'tis that the defendant should have the assignment before he paid his money; and judgment for the plaintiff. 2 Mod. 33. Pasch. 27 Car. 2 C. B. Smith v. Sherry.

S. C. cited
Ld. Raym.
Rep. 666. by
Holt. Ch. J.
who says
that they
went upon
the authority
of Ughtred's
case.—
Lutw. 252.
S. C. cited
by Holt ac-
cordingly.—
1 Salk 172.
pl. 1. C. S.
cited by Holt

and denied.—Freem. Rep. 195. pl. 199. S. C. held that (Proinde) made no condition precedent, but only specified the consideration.

50. Defendant covenanted to be accountable to the plaintiff for all arrears of rent, tithes, &c. and assigns a breach, that he hath not accounted, &c. tho' requested to do it. The defendant confesses the covenant to be accountable; but that in the same indenture, *agreatum fuit & ulterius provisum, that the plaintiff should allow and discount all moneys for parsons-dinners, &c.* which the plaintiff refused to do; and upon demurrer to this plea, it was insisted that *ulterius provisum est* makes a condition precedent; sed per Curiam, these are mutual covenants, upon which each party hath a distinct remedy, for the provisum & *agreatum est* doth not amount to a condition, but is a covenant; and in this case the defendant is bound to account upon request, and judgment for the plaintiff. 2 Mod. 73. Pasch. 28 Car. 2. C. B. Samways v. Eldfly.

51. *Devise of lands to A. and B. for payment of debts, and after in trust for the use and benefit of C. and his heirs male; but declared his will to be that C. should have no benefit of this devise, unless his father should settle such lands upon C. and in default thereof, devised the said lands to A. and B. Per Lord Chancellor, This is a condition subsequent. Vern. 79, 83. pl. 73. Mich. 1682. Popham v. Bampfild.*

[81] 52. In covenant upon *charter-party*, the plaintiff declared upon an agreement, *that his ship should be ready on the 12th of August to sail to N. beyond sea, and there would load it with figgs, and other merchandize of the defendant's, and bring them back to Topsham, &c.* and that the defendant covenanted to pay 3*l.* 15*s.* for every ton so brought, and assigns the breach in non payment of 112*l.* 10*s.* due for the freight of 30 ton; the defendant pleads that the ship was not ready to sail on the said 12th of August, whereby he lost the profit of his merchandize, and traversed that the ship was ready, &c. and upon demurrer per Curiam the plea is ill, for these are mutual covenants, and each party hath remedy for non-performance, and judgment for the plaintiff. 2 Jo. 216. Trin. 34 Car. 2. B. R. Shower v. Cudmore.

53. Copyholder of *lands of borough English*, surrender'd to the use of himself for life, and after of A. his eldest son, and his heirs, *if he lives to 21; but on condition that if A. dies before 21, then to the surrenderor and his heirs, and dies.* This is an *estate to A. presently to be defeated by condition subsequent*, viz. if A. dies before 21. 3 Lev. 132. Trin. 35 Car. 2. C. B. Edwards v. Hammond.

54. B. the plaintiff leased a mill to W. the defendant, and covenanted to find *coggs, rounds, brasses, and timber, &c.* for the mill, during the term, and W. covenanted to *keep them in repair; W. pleaded performance; B. replied that W. suffered the mill to be in decay, and shew'd in what; W. rejoined, that he demanded timber of the plaintiff to repair the same, but he refused to deliver any; and upon demurrer to this rejoinder the court was divided, whether these were conditional or mutual covenants.* Lutw. 394. Hill. 2 & 3 Jac. 2. Browne v. Walker.

55. A. seized in fee settles lands to the use of himself for life, &c. remainder to B. and the heirs male of his body, remainder to C. in tail male, remainder to A. and his heirs, with power of revocation of the estate of B. only, and to limit new uses, and after by deed the next day, reciting that he had limited an estate to B. and his heirs male, he *revokes the same, and limits it to B. and his heirs male, provided that he pays 1500*l.* to his executors, and if he fail thereof, it shall be lawful for A. and B. &c. to enter and raise the same out of the rents, issues, and profits.* A. dies. B. dies without issue. W. R. claimed the estate as heir to B. insisting that the limitation was of an estate in fee, but adjudged it was only estate tail, as the first estate was. But in arguing this case, it was urged, that this proviso was a condition precedent, and so B. never seized in fee (supposing the limitation to have been in fee) because no performance of the condition found by the verdict. But this was rejected; and it was held clearly that this was a *chattle interest in the trustees to raise 1500*l.* if B. did not pay it, and that such an interest*

3 Lev. 211.
Trin. 1 Jac.
2. C. B. the
S. C. —
Earth. 292.
Mich. 5 W.
& M. in
B. R. the
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the point of
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interest may be limited by way of use, as in case of a rent, and that upon payment the grantee may enter and receive the profits; that this is not a condition, as if it was upon a conveyance at common law, but an estate which shall arise to A. and B. upon such a contingent. Skin. 324. Mich. 4 W. & M. in B. R. Gillimore v. Harris.

56. In debt the case was, that the plaintiff, in consideration of 1100*l.* to be paid to him, &c. by the defendant, covenanted to assign, &c. to the defendant, on the 30th January next, 10 shares in the corporation of linen manufacture; and the defendant covenanted, &c. that he would then accept them, and at the same time pay the plaintiff the said 1100*l.* &c. under the penalty of 2200*l.* It was insisted for the defendant, that the assignment ought to precede the payment of the money, because the covenant to pay it was in nature of a condition, or defeasance, to save the forfeiture of the 2200*l.* and therefore shall be construed most favourably for the obligor, and cited D. 17. a. by [82] the rule of which case, and also by the resolution of the court thereupon, the payment of the money in the principal case ought to refer to the acceptance of the assignment, and not to the day in which the assignment was mentioned to be made; and if so, it was impossible that the defendant should accept of the assignment before it was made; so that the true meaning was, that the plaintiff should assign the shares on the said 30th day of January, and that the defendant should accept it, and that upon such acceptance the money should be paid; and of this opinion were all the court, whereupon the plaintiff pray'd leave to discontinue, and had it. Lutw. 490. 492. Pasch. 5 W. & M. Elwick v. Cudworth.

57. Devise to the first son of A. if he takes my name, if not to B. A. dies without issue. B. shall take; for the refusal of A's son is not a condition precedent, but a precedent estate attended with these limitations. Per Treby Ch. J. and judgment accordingly. 1 Salk. 230. pl. 8. Trin. 9 W. 3. C. B. Scattergood v. Edge.

Per Cowper C. it is a condition subsequent to defeat the estate, and not precedent. 2 Vern. 661. Trin.

1700. Trafford & Ux' v. Sir Ralph Ashton.—It was objected that tho' this devise was void as to the issue of A. yet it could not be good to the son of B. because it depended on a condition precedent, viz. If issue of A. should refuse to assume the name, or die without issue, which are impossible, A. dying without issue, cites Plowd. 272. 2 Inst. 218. tho' the condition there became impossible by the act of the party himself, and this notion was agreed to by the court. But here it was adjudged not to be a precedent condition, but part of a limitation of a devise of a particular estate which is void; but if it were collateral by itself, it would be a precedent condition; cites 19 H. 6. pl. 34, 39. Fol. 16. Devise to a monk, remainder to B. B. shall take immediately, because devise to a monk is void, but had it been that after death of the monk it should remain, B. should not take till after death of the monk. Per Powel J. 12 Mod. 285. Pasch. 11 W. 3. Arg. in case of Scattergood v. Edge.

58. Where the *onus promissæ* is the consideration of the other, and where the performance and not the promise is, is to be gathered from the words and nature of the agreement, and depends intirely thereupon; for if in case there were a positive promise that one should release his equity of redemption, and on the other side that the other would pay 7*l.* then the one might bring his action without any averment of performance; but where the agreement is, that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him 7*l.* so that the release

case is the consideration, and therefore being executory, it is a condition precedent, which must be averred. 12 Mod. 455. 460. Pafch. 13 W. 3. by Holt Ch. J. in delivering the opinion of the court in *case of Thorp v. Thorp*.

59. If there be a *day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do for another thing, and that day happens to incur before the time, the thing for which the promise, agreement, or covenant is made is to be performed by the tenor of the agreement* there, tho' the words be, that the party shall pay the money, or do the thing for such a thing, or in consideration of such a thing. After the day is past the other shall have an action for the money, or other thing, tho' the thing for which the promise, agreement, or covenant was made be not performed; for it would be repugnant there to make it a condition precedent; and therefore they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. Per Holt Ch. J. 12 Mod. 461. Pafch. 13 W. 3. in *case of Thorp v. Thorp*.

60. *A. agrees to give M. so much for the use of a coach and horses for a year, and A. agreed further with M. to keep the coach in repair; it was averred the coach and horses were delivered to M. but nothing of the repair; and Holt Ch. J. held upon this evidence that repairing was not a condition precedent, and therefore need* [83] *not be averred.* Per Holt Ch. J. at Guildhall, judgment pro querente. 12 Mod. 503. Pafch. 13 W. 3. *Atkinson v. Morrice*.

61. *But if the agreement had been that A. had agreed to give M. a coach and horses for a year, and to repair the coach, and that for that M. promised so much money, then the repairing had been a condition precedent necessary to be averred.* Per Holt Ch. J. 12 Mod. 503. Pafch. 13 W. 3. in S. C.

62. Condition that A. shall do, and *for the doing B. shall pay* is condition precedent, but *time fixed for payment* will vary the construction; per Holt Ch. J. 1 Salk. 171. Pafch. 13 W. 3. B. R. *Thorp v. Thorp*.

63. Where an *award consists of divers things, and one of them is void, and it be expressly said, that upon performance of that void thing, the other party shall do* such a thing, there the doing of the void thing is a condition precedent, and must be averred before action against the other for not doing his part; but *where there be several things in an award, and some are good and others not, and 'tis further said, that upon performance præmissorum the other shall release for the purpose, there it suffices to make averment of performance of what is well awarded* without more; per Powell J. 12. Mod. 588. Mich. 13 W. 3. in *C. B. Lee v. Elkins*.

Ibid. 590. Trevor Ch. J. said, he agreed with Powell J. in part, viz. that if part of the award be void, yet if it be a condition precedent, it must be performed before the other performs of his side; but my brother's diversity of express words of reference I think will not hold, that is, that where the words be express that upon performance of that part which is void, the other shall do such a thing, there the void thing, say, he, is a condition precedent, and must be done; but where several things are ordered, and some of them void, and that super performance præmissorum such a thing shall be done; there, he says, it is enough to do that which is well awarded, to be intitled to the thing to be done on the other side. I say, that every illegal part of an award is the same thing to many purposes as if it were not in; but yet if it appear that the arbitrators designed that such illegal part should be part of the consideration in respect of which the

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other was to perform, it must be done, or else here is not that advantage for the other side which was designed for it; and he has a wrong done him by being forced to pay for a consideration which he has not.

64. Altho' *ita quod* is held in Littleton, to make a consideration subsequent, yet that is in case of estates executed, but it is otherwise in case of things executory. As if A. shall covenant to convey his lands to B. *ita quod* 10 l. be paid to A. before Mich. the payment of the money is a condition precedent to the conveyance of the lands, and he is not obliged to perform his agreement unless the 10l. be paid at the time appointed; per Holt Ch. J. in delivering the opinion of the court. 2 Ld. Raym. Rep. 766. Pasch. 1. Ann. in case of Feltham v. Cudworth.

3 Salk. 39.
S. C. & S. P.
by Holt. Ch.
J. according-
ly, and says
that Little-
ton is so to
be under-
stood.—7
Mod. 11.
S. C. & S. P.
per Cur. for
where *ita*

quod is annexed to an agreement for a thing not executed it qualified the matter before, and is the same thing as if it were put first.

65. Condition describing the qualification of the person that is to take is in its nature a condition precedent; per lord K. Cowper. 2 Vern. 573. pl. 518. Hill. 1706. Creagh & Ux' v. Wilson & al'.

66. An infant feme marries one Ingram having lands of inheritance; articles are entred into, whereby the infant *feme was during the coverture to settle and convey over these lands, and then she was to have a rent-charge of 450 l. per ann.* for her jointure, *whereas before she had but 250 l. per annum.* Ingram dies; she marries one Wood. W. and his wife brings a bill for to have the 450l. per ann. &c. but decreed per Harcourt lord keeper, that here was a condition precedent to her having her jointure augmented which was to have been done during the coverture; and a court of equity will not relieve in such a case where omission of it was but a meer neglect in the party. In my lady Bertie's case, where a portion was given to a lady, in case she married my lord Guilford, my lord refused upon a tender, and the lady married to another by the consent and direction of the Court of Chancery; yet in this case my lord Somers refused to assist the lady, but the fortune went over; but upon an appeal in the House of Lords this matter was in a manner compromised by the lords, and the lord keeper here dismissed the plaintiff's bill; for if he should relieve her she would have both the land and the 450 l. per ann. Mich. 9 Annæ Wood v. Ingram.

[84]

67. The condition of a bond was, *whereas D. was indebted to T. in a bond of 3000 l. conditioned for payment of 1500 l. and had recovered judgment. G. upon consideration that T. the plaintiff would forbear suing out execution upon D. promised to pay the money to T. upon request, T. assigning over to him the judgment he had against D.* The defendant pleads in bar, that the plaintiff had not assigned. Plaintiff replies, that he was ready to assign. Upon the first argument on demurrer, Parker Ch. J. and Powis were of opinion for the plaintiff, and that the single question was, who was to do the first act? and that the obligor was to do it; for though he is not bound to part with his money unless the judgment be assigned to him eodem instanti, yet he must offer to him on condition the obligee will assign it. But Eyre J. e contra; for he held it a condition precedent; and also that if the judgment was assigned first, the bond might

After con-
sideration,
Parker Ch.
J. deliver'd
the opinion
of the court
for the
plaintiff;
and said, the
question at
the bar had
been, who
was to do
the first act,
whether the
plaintiff
ought first
to have as-
signed the

judgment, or the defendant to have first paid the money, and that the main objection against the plaintiff's assigning first was, that the plaintiff would then have been obliged to have found out the defendant, and have tender'd an assignment the day the money was payable by the condition, as in 3 Cro. 143. Noy 18. Hob. 69. 77. and so it would have been in the power of the defendant to have render'd his own bond ineffectual by keeping out of the way; and that on the other side it had been objected, that if the defendant ought first to have paid the money, he would have been without remedy at law for the judgment; but that the court were of opinion, that the words (*he assigning &c.*) did not amount to a condition precedent, for the words themselves do not import it, and there were no other words or reason to make such a construction necessary. In all the cases cited at the bar of conditions precedent, there is some word of priority, or one of the acts is to be at a prior time, or something that makes it necessary that one should precede the other, except the case of *Large and Cheshire*, 1 Vent. 147. 2 Keb. 801. which is of no authority; for no judgment is enter'd in that case, nor any rule for judgment to be found, and that in this case the acts of the parties ought not to have preceded, but accompanied one another; the defendant ought to have tender'd the money, but not absolutely, but sub modo he should have counted it out, and told the plaintiff here is your money, assign me the judgment, and then upon the plaintiff's delivering the assignment, the money would have been his, but not before, tho' he also had counted it, and so the assignment of the judgment ought to have been a circumstance of the payment, and that this construction of the condition obviated all the objections of both sides, and that such a special tender was not a new thing; for upon a single bill the obligor ought to tender the money upon the terms of having an acquittance, and such a tender with an *adhuc parat* is a good plea, cites Fitzh. Abr. Tit. Verdict 13. So 2 H. 7. 8. 9. Debt was brought against the executrix of the clerk of the Hanaper, upon a patent by the king to the plaintiff, for a sum of money, and a liberate to the clerk to pay it, he receiving letters of acquittance; and the better opinion there is, that the plaintiff was not obliged to offer an acquittance, but that the clerk ought to have tender'd the money, and demanded an acquittance; so in this case the defendant, to save his obligation, ought to have found out the plaintiff, and tender'd the money upon the day upon the terms of having an assignment of the judgment, and ought to have pleaded such special tender with a refusal and an *adhuc parat* as in the common case of a general tender, and since he had not done so, his plea was ill. Judgment for the plaintiff. MS. Rep. Trin. 13 Ann. B. R. Turner v. Goodwin.

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Gilb. Equ. 68. A. on the marriage of B. his son with M. an heiress, conveyed land to trustees to the use of B. and their issue, *that if M. when she comes of age shall not join to charge her estate with 2000 l.* then the indentures to be absolutely void to all intents and purposes; per Lord Harcourt this is a condition subsequent. Ch. Prec. 387.

*[85] pl. 266. Pasch. 1714. Hunt v. Hunt.

Comyns's Rep. 513. 522. pl. 214. Pasch. 9 Geo. 2. in C. B. the S. C. in an action of debt, Ld. Ch. J. Reeve thought it a condition subsequent; but the other judges doubting, it was adjourned; and afterwards in 69. A. gave a legacy of 6000 l. to L. the only child of M. and died, leaving M. his heir at law, but devised all his real estate to B. The legacy to L. was made payable at her age of 21 or marriage, which should * first happen, and to be in lieu and satisfaction of all which she might claim out of his real or personal estate, and upon condition she should release all right and title thereunto unto his executors and trustees. It was insisted, that L. had no right during her mother's life, that L. might marry while an infant, and so her legacy become due, and she not capable of releasing, or might intermarry with an infant, and so neither she nor her husband capable of releasing, and yet the legacy due; wherefore supposing it to be a condition, it could be no more than a condition subsequent, quod curia concessit. Wms's Rep. 783. 785. Hill. 1721. [Trin. 1722] in Canc. Acherley v. Wheeler and Vernon.

After term, 12 Geo. 2. Willes Ch. J. and the whole court, inclined to think it a condition precedent; but held, that supposing it to be a condition subsequent, yet not being performed, the plaintiff was not intitled to the arrears of the annuity, and therefore the verdict was set aside, and the plaintiff to pay the

the costs of a nonsuit.——Fortescue's Rep. 189. 194. S. C. adjudge'd, and Ld. Ch. J. Willes, who delivered the opinion of the court, said, that his brothers were of opinion that it is a condition precedent, but his lordship said, that the same words will make it a condition subsequent as well as precedent, and cites several cases.

70. In all *executory agreements* where the plaintiff declares pro consideratione, there the word (*pro*) makes it a condition precedent, (that is) the thing shall be done or tendered to be done before the defendant shall be obliged to pay, and neither of the parties can have an action of covenant without *averring the performance*. 8 Mod. 42. Pasch. 7 Geo. 1. in case of Lock v. Wright.

71. A. in consideration of 500 l. which he is to have with his wife in money and goods, and of the marriage, made a settlement, and gave her a power to dispose of 200 l. by will, which she did about 15 years after. On a bill in chancery by the legatees, A. insisted, that this was a condition precedent, and that he never received more than 300 l. as a marriage portion with his wife; but the Master of the Rolls held otherwise, and that the quantum of the portion *seemed rather a computation*, and was satisfied therewith, and decreed the 200 l. to be raised. 2 Wms's Rep. (618.) Trin. 1731. North v. Ansell.

[For more of Conditions precedent see Tit. Devise, Remainder (W) per tot. Stocks, per tot. and other proper titles.]

(T. 2) What shall be said a Condition precedent, and what subsequent, as to Marriages and Marriage Portions. And in what Cases forfeited. See Tit. Marriage (K).

1. **A** Lease for years to Sir Edward Waldgrave and lady, on trust to raise 900 l. for a feme sole, in case she did not marry contrary to good liking of Sir Edward and lady; if she did, then to go to such persons as Sir Edward and lady, or survivor should nominate, and for want of nomination to Sir Edward and lady, or survivor of them; she marries without their consent, they die without any nomination; bill was preferred by Sandall, who had a general deed of gift by lady W. who surviv'd, of all her goods and chattels, against F. Copledite, who had administration to the feme and lady W. to have the benefit of this lease; which was decreed for Copledite. Comyn's Rep. 739. 740. * Pasch. 13 Geo. 2. in case of Harvy v. Aston. cites Chan. Cases 58. [Mich. 16 Car. 2.] Fleming v. Waldgrave. But ibid. 740. his lordship says the case is obscurely reported, but here was no nomination, for the gift of all her goods and chattels could not amount to make Sandall nominee of this 900 l. Here appears

no dislike of marriage; for tho' no consent, it does not appear they disliked it, and the making no nomination is an argument they did not, and so the condition not broken; and this might be the reason that the book faith, it was not in the power of the trustees to dispose of the lease otherwise; tho' the book gives no reason for such saying, but in the case of *Treagh v. Wilson*. 2 Vern. 573. it is said, there may be a difference between marrying without consent, and marrying against consent, according to the case of Fleming v. Waldgrave.

* [86]

2. The daughter of lord Kelmurry, and the son of lord K. pre- But ib. 741, 742. his lordship says, for a bill to have the benefit of a settlement made by lord K. and his

It is evident this decree was not conformable to the usual course of proceedings in equity; if one may guess upon so short and obscure a report of the case, it seems to be a decree by consent. The brother Robert, who probably was the eldest son of lord K. and party to the settlement and to the bill, and to whom his son, whereby trustees were to raise 1500 l. a-piece for portions of 2 daughters, the plaintiffs and the sisters, payable at their marriage with consent of trustees or major part of them, and maintenance in mean time; and if trustees had raised the portions before they married, they were to improve them to the best advantage, that they might receive the increase for maintenance till marriage; and if they married without consent, the portion of her so marrying should remain over to another. The trustees received the rents ever since the death of lord K. and raised the portions; and the plaintiffs being in years, and intending not to marry, would lay out their portions in purchase of annuities for their larger maintenance. Question was, Whether plaintiffs ought to have portions at their own disposal, before they married with consent? And it being admitted, if either died before marriage, her portion should go to her executor or administrator, and they offering security to indemnify trustees from claim by defendants, who were infants, children of Charles lord K. to whom the portions after marriage without consent were limited by the settlement, the court decreed it on giving such security. Comyns's Rep. 740, 741. Ld. Ch. B. Comyns cites Fin. Rep. 62. [Hill. 25. Car. 2.] Needham v. Vernon.

the benefit of the portions, if not paid, would result, consents his 2 sisters should have their portions to lay out in the purchase of annuities for their better support, and so admits they would go to their executor or administrator if they died unmarried; or perhaps it might be apprehended by the parties, that a sum of money given to a daughter to be paid at marriage, like a sum devised to an infant to be paid at his age of 21 years, was an interest vested that would go to an executor or administrator, though the devise died before the time of payment, and upon such admission the portions were decreed. But there was still a difficulty for the defendants to whom the money was limited over, in case the daughters married without the consent of trustees; but the plaintiffs being in years, and declaring they intended never to marry; and being less likely so to do, when their fortunes were turned to annuities, and offering any security to indemnify trustees against the infants claim, on such security which the trustees were willing to accept, the court decreed the portions to them. However it is manifest, that this question, whether the condition annexed to the payment of the portions, that the daughters should not marry without consent of trustees, is good, or not, was not the thing under the consideration of the court; for they decreed the portions though the daughters never married; whereas it is agreed on all sides in the present case, that marriage is necessary before the portions are payable, whether the mother's consent is necessary or not. But it is most evident the court look'd upon the condition as good, or there had been no need of security to indemnify the trustees. (What need of such security if the condition was void?)

2 Freem. Rep. 186. pl. 263. S. C. says the father made a settlement of his estate (reciting the intended marriage &c.) and limits it to the use of himself for life, remainder to the use of J. S. and the defendant, and their heirs

* [87]

3. A settlement was made by W. by deed and will, reciting a marriage intended between A. and B. the daughter of W. and then comes a clause, that if B. should live to 16 years of age, and should refuse to marry A. then A. should have 20,000 l. out of the personal estate; And afterwards comes another clause, that if it happen that the said intended marriage be not had till after B's age of 16 years, then the real and personal estate is settled on A. & B. for their lives, &c. The marriage was had before B. was 16 years old, but she lived to 16 and died before 17 without issue. 'Twas urged, that A. and B. marrying before 16, the personal estate was not vested so as to intitle the administrator of B. and that the grantor's intent was to restrain B. from marrying before 16; But lord Jeffries took it, that a marriage between A. and B. was the chief intent * and of the 20,000 l. penalty for refusal, and that the latter clause was only to bring back that 20,000 l. into the personal estate to be settled to the same uses with the rest, in case the marriage

riage

riage should be after 16, and decreed an account. Vern. 338. pl. 332. Mich. 1685. Duke of Southampton v. Crammer & al'. to the intent that in case the plaintiff

should be married to his said daughter after the age of 16, and that they should have issue male between them, that then the said trustees and their heirs should stand seised of the premises in trust for the plaintiff during his life, and after his decease in trust for his said daughter for her life, and after in trust for such issue in tail, &c. The said plaintiff was married to the said daughter before her age of 14, but she lived till she was above the age of 16, and then died without issue; and the plaintiff preferred his bill to have this trust executed to him for his life, and the only question was, Whether he was intitled to this estate for life? And it was held, that altho' she was married before the age of 16, yet in as much as she lived till after the age of 16, she might properly enough be said to be married after the age of 16; and so it was held in *Lord Salisbury's case*, and affirmed in the House of Lords. They all held, that although there was no issue of that marriage, yet the plaintiff was intitled for his life; for that should be taken *reddendo singula singulis*, and the having of issue should be no condition precedent to his trust for life, but should refer to that limitation of the trust to the issue; For that a trust should be expounded by the same rules as a will, or as articles of agreement, which need not that precise form of words as a limitation of an estate at law; as an agreement to convey an estate to J. S. for ever will carry the fee simple. And Trevor said, that if it were the limitation of an use at law, it would be sufficient to create an estate for life, the intent of the party so plainly appearing as it does in this case. This cause being afterwards heard in the House of Lords, the decree was reversed.—*Show. Parl. case 183. Wood, alias, Cranmere v. the Duke of Southampton, S. C.* says the Court of Chancery decreed the profits to J. S. for life; but against this decree 'twas argued, that where a condition *repulsive*, consisting of several branches, as this does, is made precedent to any use or trust, the entire condition must be perform'd or else the use or trust can never arise or take place, and that the performance of one part only is not sufficient; and the decree was reversed accordingly.—*S. C.* cited by Lord Ch. Baron Comyns in his *Lordship's* (as I suppose it is) delivery of his opinion, in the case of *Harvey v. Aston, Pasch. 13 Geo. 2. Comyns's Rep. 732.*

4. A. by marriage settlement provided 2000 l. *a-piece*, and after, 2 Vern. 458. pl. 415. Mich. 1703. S. C. by will, directs the making up their portions 3000 l. *a-piece*, and charges his real and personal estate, *provided they marry with the consent of their mother*; per Lord Wright and Master of the Rolls, 'tis a condition subsequent. Ch. Prec. 226. pl. 186. Trin. 1703. *Ashton v. Ashton.*

5. A. by will leaves his grand-daughter 200l. *provided she continued with his executors until 21, but if taken from them by her father, who was a papist, before 21, or if she married against the consent of his executors then he gave her but 10 l. and made B. and C. executors.* She was placed by the executors with D. a clergyman, and before she was 21 D. and one of the executors consented that she should make a visit to her father, when the father, unknown to the executors, married her to a papist. Decreed at the rolls for payment of the 200 l. to the daughter; but on appeal Ld. Cowper decreed her only the 10 l. He held that the continuance with D. by direction of the executors was well, and that this was a marriage against their consent, they not having opportunity to declare their dislike before marriage, and declaring it upon notice after; and that the condition describing the qualifications of the person who was to take, was in its nature a *condition precedent*. 2 Vern. 572. pl. 518. Hill. 1706. *Creagh and Ux' v. Wilson.* S. C. cited by the Master of the Rolls, and said it was a very good condition, and that if the testator's intent be defeated in that respect, the legacy shall not be paid. See Chan. Cases in Ld. Talbot's time, 216. in the case of Hervey v. Ash

S. C. cited Comyns's Rep. 755, by the Lord Ch. B.

6. J. S. having 4 daughters, A. B. C. and D. in 1705. devised &c. several parcels of his estate severally to his 4 daughters, & inter al' devised to trustees his lands in E. and F. in trust for A. until her marriage or death, and in case she marries with the consent of her trustees, then for her and her heirs; but in case she should marry But where the party cannot be compensated in damages, it is against conscience without to relieve

and in Fry and Porter's case the condition could not be compensated in damages, being a marriage without consent. Precedent conditions must be literally performed, and a Court of Equity will never vest an estate when by means of a condition precedent it will not vest at law; but as conditions subsequent are to divest an estate, there it is otherwise where there can be a compensation made in damages, as above, but in any other case, even in case of condition subsequent it is otherwise. *Ibid.*

*[88]

without their consent, then to her other sisters equally between them &c. In 1708, *A. marries W. R. with the consent and approbation of her father, who settles upon this marriage part of those lands devised to her, and also 7 l. * per ann. fee farm rent.* In 1709 *J. S. dies without altering his will.* Objected that this was a condition precedent, and till performance the estate could not vest, and equity will not aid in this case; but Cowper C. decreed that *by the marriage with the consent of the father, the condition was dispensed with,* and the devise become absolute; for conditions of this kind, whether precedent or subsequent, were in nature of penalties and forfeitures, and if the substantial part and intent be performed, equity will supply small defects and circumstances, and favour the devisee. Here is no forfeiture, and it was never the intent of the testator that the estate should be taken from the first devisee, when it can't go to the devisee over, and be let to descend to the heir at law. MS Rep. Mich. 3 Geo. Canc. *Clark and Ux' v. Lucy and al'.*

7. A legacy was devised to *A.* to be paid at the age of 21 or marriage, which shall first happen, so as such marriage be with consent of *B.* and if not, then he devised the same to his other daughters. *A.* marries without consent, and dies before 21, leaving issue. Lord Chancellor said that this is not to be considered under the notion of a forfeiture; that it is merely a legacy given, and 2 days of payment appointed with a devise over; and the person dies before the legacy grew due, and so decreed that *A.* dying before marriage with consent, or 21, an account should be taken of her part, and that that, and the improvements of it, be paid to the surviving sisters. Sel. Cases in Canc. in Ed King's time. 26. Trin. 11 Geo. Piggot v. Morris.

8. *A.* devised a legacy of 1000 l. to his daughter, on condition that she marry a man who bore the name and arms of Barlow, and if she marry one that should not bear such name and arms, then he devised the 1000 l. to *J. S.* The daughter married one Bateman, but about 3 weeks before the marriage he called himself Barlow. On a bill brought by *J. S.* for the 1000 l. as forfeited to him, the Master of the Rolls was of opinion that the condition was complied with by the taking the name of Barlow, and tho' it was insisted by the plaintiff's counsel, that the defendant, when he had received the legacy, would probably resume the name of Bateman, and therefore pray'd that he might be decreed to retain the name of Barlow ever after, yet his Honour refused to make any such decree. 3 Wms's Rep. 65. pl. 6. Trin. 1730. *Barlow v. Bateman.*

9. *A.* by will devised all his lands to *C.* and his heirs in trust to pay debts, and then in trust for *B.* his grand-daughter, and the heirs of her body, remainder to *C.* and his heirs, upon condition that he marry *B.* and gave *C.* his personal estate in trust for *B.* until she attain 21, and made *C.* executor, and died. *B.* refused to marry *C.* and married

ried J. R. and afterwards at her age of 21, B. and J. R. made a bargain and sale to W. R. to make him tenant to the præcipe in order to suffer a common recovery, in which B. and J. R. were vouch'd, and the uses were declared to the issue of the marriage, remainder to her own right heirs. One question was, whether the condition annexed to the defendant's remainder be a condition precedent or subsequent? and as to this, Lord Chancellor said he was inclined to think it is a condition subsequent. There are no * technical words to distinguish conditions precedent and subsequent; but the same words may indifferently make either, according to the intent of the person who creates it. In this case the precedent limitation was an estate tail in possession; and therefore why shall we not say, that as to this remainder likewise it was the testator's intent to have it vest immediately in the defendant? The limitation is immediate, altho' the condition upon which it depends is subsequent. *Cases in Chanc. in Ld Talbot's time, 166. Hill. 9 Geo. 2: Sir John Robinfon v. Comyns.*

10. A. by settlement after marriage created a term of 1000 years in trust by mortgage or sale to raise 2000 l. for each of the daughters portions, provided they marry with their mother's consent, and if either die before marriage with such consent, her portion to cease, and the premises to be discharged; and if raised, then to be paid to the person to whom the premises should belong; and afterwards by will created another trust-term to augment their fortunes 2000l. a-piece more, but subject to the like condition as in the settlement, and gave the residue over and above the 2000l. a piece to his wife; and by a codicil created another trust-term, for the better raising of his daughter's portions. A. died, leaving 2 daughters, J. and K.— J. after age of 21, married R. S. and K. before 21 married W. R. and both without the mother's consent. They and their husbands brought a bill for their portions. The Master of the Rolls took notice of the clause, declaring that if either die before marriage with such consent, her portion should cease, which was insisted upon by the counsel to be sufficient disposition of it; but he said that surely this was not a good disposition within the meaning of those cases, that allow a limitation over to be good; for this is not to take place upon marriage without consent, but upon dying before marriage with such consent, and is no more than providing for daughters dying unmarried; he taking it all along, that if they married they would do it with consent; that here does not appear to be any person in the testator's view, to whom these fortunes should go over, as in other cases where those limitations over are allow'd; that tho' these portions are charged upon land, yet there being no distinction between conditions annexed to money charged upon land, and such as are to arise out of the personal estate, and portions by will being due by the ecclesiastical law, notwithstanding such condition as this annexed to them, portions by settlement (tho' under the like conditions) are likewise due by the law and rules of this court, and therefore thought the plaintiffs, the daughters, well intitled to their portions; and so order'd the husband of the one to make proposals before the Master as to settling his wife's fortune, and that the fortune of the other

* See (T)
pl. 69.

[89]

On appeal from this decree made by the Master of the Rolls, it was held, that A's daughters were not intitled to their portions by this settlement; unless on their marriage with their mother's consent. And *Ld. Ch. B. Comyns*, who was called in to assist the court in his argument, said, that the reasons on which he grounded his opinion, are, 1st. That it is the right and liberty of the subject, who makes a voluntary disposition of his own property, to dispose of it in what manner, and upon what

terms and conditions he pleases; this he believed will be universally allowed. 2dly, That it is a fixed and settled maxim of law, that if an estate in land, or interest out of the land, is limited to commence upon a condition precedent, nothing can vest or take effect till the condition performed. And this is so strong and so settled a point, that it holds although the previous act was at first impossible, or after becomes impossible by the act of God, or other accident, the estate can never vest. Comyns's Rep. 744. in his lordship's argument. And his lordship said, that a third reason which influenced him to this opinion, is, that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who placed the trust in him; it is said a trust is construed favourably; and it is true, it is construed with as much advantage as may be to make good and answer the intent and design of the party; but it is construed strictly with regard to the execution of the trust; and therefore it would be a strange thing, when the trust directs the trustees to pay the money at the time of the daughter's marriage with her mother's consent, that the court should direct them to pay the money before that time. 4thly, But that it is an argument of no small weight in his opinion, that the restraint in the present case is not only lawful, but prudent and reasonable, and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage. Comyns's Rep. 748. The Lords Ch. J. Sir W. Lee, and Sir J. Willes, who assisted the Ld. Chan. Hardwicke upon this appeal, being of the same opinion, his lordship was pleased to concur; and thereupon the decree of his honour, the Master of the Rolls, was reversed. Comyns's Rep. 757.

. P. by Ld. Ch. Baron Comyns, in his Reports, 32. Pasch. 3 Geo. 2. 11. When a condition *copulative*, consisting of *several branches*, is made *precedent to any use or trust*, the intire condition must be * performed, or else the use or trust can never rise or take place. Show. Parl. Cases. 85.

In case of Harvey v. Aston, says it is a known rule, and that the case of Sir Cesar Wood, alias Creamer, v. duke of Southampton, Parl. Cases 83, is an authority express in this point; Sir H. Wood, on [in consideration of a] marriage of [to be had between] his daughter with the duke, made a settlement on trust to raise maintenance for his daughter till [12 years of age, and then of 550 l. a year till] marriage, or age of 17, and if his daughter after her age of 16 should marry and have issue male by the duke then for settlement on the issue male, and for a better provision for the duke and his wife, on trust for the duke and his wife for their lives, and after to their first and other sons in tail male. She married [the said duke] before the age of 16, and after that age died without issue; the question was, whether the duke should not have the estate for his life? and at first decreed for him, but that decree was reversed in the House of Lords; for it was said the words were plain and certain, that there must not only be a marriage, but issue male; and it would be violence to break the condition into 2 parts, which is but one according to the plain and natural sense of it.—The same determination was made afterwards in this court between Sir Cesar Wood and W. Webb. Parl. Cases 87. and affirmed in the House of Lords. Ibid.

* [90]

12. A *personal legacy* in case of *limitation over*, given on a condition not to marry without consent, shall be lost if the condition be broken; per Ld Ch B. Comyns, says it is admitted. Comyns's Rep. 755. Pasch. 13 Geo. 2.

(T. 3) Breach relieved. In what Cases of Conditions precedent or subsequent.

1. *TRUST* created, by which the wife was to have an *estate for life*, on condition that she settle her own lands within 18 months after the husband's decease, on her and her husband's children, else to be void. She signified to one of the trustees within the time, her willingness to do her part, but doubted the title to the estate for life, and in a bill by her brought in this court, declared her willingness to make such settlement, but not *unless her estate for life was confirmed*, which was decreed in the manner proposed, and the

the trustees to be indemnified. Fin. R. 67. Hill. 25 Car. 2. Wallop v. Shaftsbury and Vernon.

2. A. on marriage of B. his daughter with C. entred into articles with C. to pay down 1500 l. and 2500 l. more within 6 months after C. should settle on B. 800 l. per ann. Afterwards by another indenture between A. B. and C. in consideration of the said marriage to be had, and of 4000 l. mentioned to be paid, or secur'd to be paid to C. C. settled lands of 446 l. per ann. and A. paid C. 1500 l. and at the same time A. gave the security to pay the 2500 l. and at the same time C. by other articles, covenanted within 3 years to purchase and settle 354 l. per ann. to make up the 800 l. per ann. and in the same articles A. covenanted to pay C. or his assigns 2500 l. within 6 months next after such purchase and settlement made, and interest for the same half yearly in the mean time, and if C. died before such purchase, &c. then A. within 6 months after C's death, to pay to B. her executors, &c. the 2500 l. and for default of payment of interest, &c. to such persons as the same shall become due to, the trustees were to enter and sell the lands charg'd. B. died within a month, and no purchase made; per Cur. here is no pretence that the articles were contrary to the intention of the parties, and so this covenant is in nature of a condition * precedent, and can't be discharged in equity; and here is a deed of trust, a jointure-deed, and articles, all of the same date, and shall be intended to be executed at the same time, and are all as one entire agreement, therefore the recital in the jointure-deed, that it was in consideration of marriage, and of 4000 l. paid or secured, as the portion can't be understood as any positive agreement, but must be expounded by the articles to which it does in a manner refer in some cases, and upon special circumstances a court of equity has expounded deeds otherwise than the letter thereof seems to import, yet this ought never to be done so as to make a deed, but only to avoid some extremity. Fin. R. 98. Hill. 25 Car. 2. Cheek v. Ld. Lisle and Harvey.

3. Bill to have a legacy of 1000 l. which was money secured by a bond to be paid to the testator within 7 years after his marriage, and after a jointure of 600 l. should be settled on his wife. The defendant pleads, that the money was to be paid upon condition, and that the party died before the condition was performed. But the plea was over-ruled. Mich. 26 Car. 2. Fin. R. 178. Glascock v. Brownwell.

4. Devise to A. in tail male, and for default of such issue, to B. and his heirs, on condition to pay to C. D. and E. 500 l. to be divided equally, and if B. shall refuse to pay, then the lands to go to C. D. and E. &c. A. died without issue; defendants insisted that this was a condition precedent, but the plaintiff was reliev'd on payment of the 500 l. and interest since A.'s death. Fin. R. 403. Hill. 31 Car. 2. Pitcairne v. Brace, Wheeler, &c. al'.

5. F. on his marriage of M. daughter to Sir G. S. by marriage articles was to settle 2000 l. a year, viz. 1200 l. a year, of which he was then seised, and to purchase and settle 800 l. per ann. more; but 'twas expressly agreed in the articles that before Sir G. S. should make the settlement agreed to be made by him, which was 1000 l. per ann. now, and 3000 l. per ann. at his death, the plaintiff the husband should

Freem. Rep. 302. pl. 367. S. C. but Curia ad visare vult. — Ibid. 303. pl. 372. S. C. held accordingly by the lord keeper and Rainford J. and so the bill was dismissed. — S. C. cited accordingly. Vern. 69. — 2 Keb. 794. pl. 30. Hill. 23 Car. 2. B. R. the S. C. but S. P. does not appear. — S. C. & S. P. cited by lord chancellor 2 Freem. Rep. 36. * [91]

tho' F. had not as yet purchased the 800l. a year, it should be no prejudice to him, but he should take his own time for doing it; and a great many expressions of this kind from Sir G. S. were proved, and were insisted upon by plaintiff's counsel to be in nature of dispensations with the performance of that part of the agreement; but lord chancellor, assisted by North Ch. J. and Montague Ch. B. delivered their opinions against the plaintiff; because what was to be done was in nature of a condition precedent, and ought to have been wholly done before defendant was obliged to do what was to be done on his part.—Skin. 287. S. C. cited per Hutchins commissioner, as follows, viz. That upon the marriage of a daughter of Sir Geo. Sands, the late E. of Feverham was to have by agreement 3000l. per ann. when the present lord everham settled 2000l. per ann. for a jointure; the estate in possession of the lord Feverham was nothing but Holdenby, which is about 800l. per ann. but he had pensions in Ireland to commence in futuro, which being sold would amount to what would purchase 2000l. per ann. The marriage took effect, and afterwards the *Ld. Feverham was upon treaty to sell his pensions, in order to the purchasing and settling the 2000l. per ann.* the then lord Feverham hearing of it told him, that these pensions, not being in possession, they would not sell for so much as when they came into possession, and so *advised him not to part with them yet*; and he accordingly forebore, and then his wife dies; and the then lord Feverham dies; and the present lord Feverham prefers his bill against Mr. Watson who married the other sister, and was the daughter and heir of Sir Geo. Sands; And it was decreed in B. R. and afterwards affirmed in the House of Lords, that the lord Feverham should have an execution of the first agreement; and that this was a *dispensation* in Sir Geo. Sands of the agreement for the present, which should not prejudice the lord Feverham.

* [92]

Conditions subsequent, that are to defeat an estate are not favoured in law. And if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited, and a court of equity may relieve, to prevent the vesting of an estate, but not to give an estate that never vested. Per Holt Ch. J. 2 Vern. 339. Hill. 1697. in case of Cary v. Bertie. — S. P. by Holt Ch. J. 12 Mod. 183. in case of Certy v. Falkland. S. C. in Canc.

6. Conditions subsequent need not be literally performed, where they are to divest an estate, but equity can only relieve against conditions subsequent, where there can be a compensation in damages. Per Fin. C. Vern. R. 83. Mich. 1682. Popham v. Bampffield.

7. A. de-

7. A. devised lands to B. and C. in trust for J. S. *on condition that the father of J. S. should settle on J. S. 2 thirds of the estate settled by the grandfather on the father*; the estate settled by the grandfather was 6000 l. per ann. The father devised all his estate to J. S. but subject to debts and legacies, but in effect made no settlement otherwise (for tho' he made one, yet 'twas with power of revocation, and he actually did revoke it.) North K. decreed that if on reference to a master, it should appear that after debts &c. paid 2 thirds remained, that 'twas a good performance, and on rehearing said, the difference was whether this case lay in *compensation* or not, for where a recompence can be made, this court will relieve against such a condition, and declared if a compensation was made *by the will*, he would relieve against the breach of the condition; but if a sufficient compensation was not made, he would then consider farther of it. Vern. 79. pl. 73. Mich. 1682. & 167. pl. 159. Pasch. 1683. Popham v. Bampffield.

12 Mod.
184. S. C.
cited per
Holt Ch. J.
as the case
of Popham
v. Rogers,
and reports
it thus, viz.
a devise to
Sir F. Pop-
ham, on con-
dition he
should let 2
thirds there-
of descend to
his heir. He
did not do
so, but per-
mitted other
lands to the
value of 2

thirds to descend, and this was held in equity to be a sufficient performance of the will. Because the testator's design was satisfied thereby, it being to make Sir F. P. a good husband to provide for his posterity.

8. Devise, that if his daughters should release to his heir their right to certain lands, he gave them 2000 l. a-piece on condition they should release &c. The land to be released was not worth 500 l. One of the daughters died before any release given; serjeant Maynard urg'd, that there was a difference between a *condition in the giving* a portion, and a *portion given upon condition*; for that in the former case the portion never arises unless the condition is performed; the surviving daughters brought a bill, which was dismissed by lord C. Nottingham; but on a review and a demurrer North K. inclined to over-rule the demurrer, and said that in all cases where the matter lies in *compensation*, be the condition precedent or subsequent, there ought to be relief; and by agreement the signing and inrolling the decree was set aside, and the cause to be heard *de integro*. Vern. 222. pl. 221. Hill. 1683. Hayward v. Angell.

[93]

9. One having 3 daughters, *devises land to his eldest, upon condition that she, within 6 months after his death, pay certain sums to her 2 other sisters, and if she failed, then he devised the land to his second daughter on the like condition &c.* The court may enlarge the time for payment, tho' the premises are devised; and in all cases that lie in *compensation*, the court may dispense with the time, tho' even in case of a condition precedent. 2 Vern. 222. pl. 202. Pasch. 1691. Woodman v. Black.

10. If an estate is to vest on the intermarriage of A. and B. and the condition becomes *impossible by the act of God*, as in case A. had died within 3 years limited for the marriage, or soon after the death of the testator, Holt Ch. J. thought the estate would never arise, and that there would be no relief in that case. 2 Vern. 340. Hill. 1697. in case of Cary v. Bertie.

11. Where a condition is precedent to the vesting of an estate, 2 Vern. 319, chancery cannot relieve in case of *non-performance*; otherwise in S.C. & S.P.

183. S. C. case of a forfeiture for which a valuation can be made and compensation given. 1 Salk. 231. pl. 10. Hill. 9 W. 3, in Canc. Bertie v. Falkland.

83. Popham

v. Barnfield, S. P. as to the vesting per Finch C. who says it was so ruled in lord Feverham's case here, tho' the lords afterwards reversed that decree.

12. A seised in fee having three daughters, devised to trustees to convey to the eldest, if she shall pay 6000 l. to her 2 sisters in 6 months, and if she shall not, then gives the like pre-emption for the same time to the 2d, and if she shall not to the 3d; the money must be paid punctually at the time, and equity will not enlarge it. MS. Tab. February 7th 1705, Mafton v. Willoughby.

13. I give and bequeath to E. V. 100 l. to be paid him within 6 months after he shall have served his apprenticeship; he ran away from his apprenticeship and died; the question was, whether the legacy was to be paid to his representative? decreed, that the serving apprenticeship is not the condition annexed to the legacy, but only an appointment when it shall be paid, and the rather, for if E. V. had died before expiration of his apprenticeship, his representative would have been intitled to the legacy. MS. Tab. July 26. 1712. Sidney v. Vaughan.

14. In a marriage settlement, a power was lodged in trustees to raise 3000 l. for a daughter, to be paid her at the age of 21, or day of marriage, which should first pappen, when C. and his wife should die without issue male, and in the mean time an 100 l. per ann. to be paid her for her maintenance; resolved, per lord Ch. Cowper, upon the authority of the duke of Southampton's case, that the words, when C. and his wife should die without issue male, amounted to a condition precedent; and that the time of raising the portion did not commence when one of them should be dead without issue male, and the other be tenant in tail after possibility of issue extinct, but when both of them should be dead without issue male, 10. Mod. 314. Pasch. 1 Geo. 1. Champney v. Champney.

15. Equity will not relieve against the breach of a condition precedent where the damages accrued are contingent, and cannot be estimated. MS. Tab. 1723. Sweet v. Anderson.

[94] (U) What shall be said a Condition against Law,
[And Pleadings.]

See Tit. Si-
mony (f) [1.] F the condition of an obligation in which A. is bound to B, is, that whereas A. in a short time is to be presented, instituted, and inducted, to the church of D. if A. after his admission, institution, and induction to it at all times upon request of B. his executors or administrators, resigns the said rectory and church to the ordinary or guardian of the spiritualities for the time being, by which B. his heirs or assigns, patrons of the said church, may present de novo to the said church, discharged of all the charges and incumbences made or suffered by A. this is a good condition of itself without averment that it was for a simoniacal purpose. Mich. 14 Car. between

between *Carey and Yeo* adjudged upon a demurrer. *Intratur Hill*. 13 Car. Rot. 445. And another action between the same parties, adjudged the same term, upon the like condition. *Intratur Hill*. 13 Car. Rot. 438. 432.]

[2. *So* if the condition of such obligation be, *that he, after institution and induction into the said church, shall at all times after ordinarily be resident*, and serving the cure of the said benefice, *without absence by 80 days* in any one year during the time he shall be parson of the said church; this is a good condition without any averment taken to be for any *simoniacal* purpose. Mich. 14 Car. B. R. between *Carey and Yeo*, adjudged upon demurrer. *Intratur Hill*. 13 Car. Rot. 444.]

[3. If the sheriff of a county makes B. his under-sheriff, and takes a covenant from his under-sheriff, *that he will not serve executions without his special warrant*, this is a void covenant, because it is against law and justice, in as much as when he is made under-sheriff, he is liable by the law to execute all process, as well as the sheriff is. *Hobart's Reports* 18. Tr. 12 Jac. B. R. between *Norton and Syms*, per curiam.]

4. If W. be bound in a bond, *that if he recovers against P. certain lands at the costs of J. N. that then he shall infeoff the said J. N.* the bond is void, and the plaintiff shall not recover; per *Belk*. Contrary it seems of a condition *impossible*. Br. Obligation, pl. 11, cites 42 E. 3. 6.

5. A man was bound to another *that he should not use his art in D. such a vill, by a certain time*. *Hull* said, if the plaintiff had been present he should go to prison; the cause seems to be, because the bond is against law. Br. Obligation, pl. 85, cites 2 H. 5. 5. and *Fitzh.* imprisonment 14.

6. Bond *to save harmless against all men*, or against all the world, is void. Arg. *Godb.* 212. cites 8 E. 4. 13, 2 H. 4. 9. 7 H. 7.

7. The under-marshal took a bond of one in execution, and of a stranger, *to indemnify from escapes*, and then he let the prisoner at large. The court agreed, that the condition was against law, and the obligation void by the stat. 23 H. 6. cap. 10, though the marshal is not named therein. Cro. E. 66. pl. 12. Mich. 29 & 30 Eliz. B. R. *Bracebridge v. Vaughan*.

8. A bond was conditioned, *that if the obligor shall from henceforth, during the natural lives of him and the said A. account of, use, and maintain the said Alice as his lawful wife*, to all constructions and purposes, &c. then this obligation to be void, or else to stand in full force. The defendant pleaded, *that before the said A. was espoused to him, she was married to one Hawle, who is still living, and therefore the defendant could not use and maintain her as his lawful wife*; and upon demurrer the whole court held the justification good, because the condition was against the law of God, and so the obligation void; and that he is not estopp'd by calling her his wife in the obligation to plead this special matter. Mo. 477. pl. 683. Mich. 39 & 40 Eliz. *Prat v. Phanner*.

9. Condition was, *that the obligor should be always ready to give evidence, and testify the truth in any of the queen's courts, in all things*

See Tit. Simony (F) pl. 2. *Babington v. Wood* and the notes there.

Mo. 856. pl. 1175. S. C. accordingly. But see Tit. under-sheriff (A) pl. 5, 6. and the notes there.

things which should be demanded of him on the part of the obligee, upon reasonable request, and his charges borne; and that he should not hurt or endanger, or molest the obligee in his lands or goods by reason of any thing whatsoever. Upon a demurrer the court held the condition good, and not against law; for, as to the first part, if he had not been obliged thereto, he is compellable by the law; and the last part shall be intended, that he shall not hurt, &c. *tortiously*, but is not to restrain him from pursuing the obligee for felony, or upon any other just cause. Wherefore it was adjudged for the plaintiff without argument. Cro. E. 705. Mich. 41 & 42 Eliz. B. R. Dobson v. Crew.

But Warden of the Fleet or of the palace of Westminster may take bond for diet, &c. Het. 146. Harris v. Lea.

10. Bond to sheriff to be a true prisoner, or to pay for his eating and drinking, the condition is wholly void. 10 Rep. 100. b. Mich. 10 Jac. in Beawfage's case.

11. If a sheriff takes a bond for a point against the 23 H. 6. and also for a due debt, the whole bond is void. Hob. 14. pl. 25. Trin. 12 Jac. in case of Norton v. Symmes.

12. Bond to sheriff for fees before he had done his office is void for that very reason. Adjudged. Lat. 20. Pasch. 2 Car. Empson's case.

Jo. 341 pl. 1. Todderidge v. Mackalley. S. C. adjudged accordingly, and so a judgment given in the court of the Tower of London was reversed.

13. Condition to pay money, if obligee will procure him to be rector of a church, is unlawful. Cro. C. 361. Pasch. 11 Car. B. R. Mackellar v. Todderick.

The defendant seeks to put a bond in suit against the plaintiff, having married her, that promised not to marry without the consent of friends; ordered not to proceed. 10th. 88. cites 32 Eliz. Pearcy v. Bardolf.

14. A gift or devise on condition *not to marry*; yet the donee shall have the full benefit of the gift, &c. as if no such condition was annexed thereto. But had it been *not to marry any of such a town*, it would be good. Arg. 2. Show. 352. Pasch. 36 Car. 2. B. R.

Comb. 121. S. C. and the court was clearly of opinion that it tended to a monopoly, and gave judgment for the defendant.

15. A bond was conditioned *not to buy sheep's feet of any but A. or B. and not to buy above such a quantity.* This is plainly restrictive of trade and void. Show. 2. Pasch. 1 W. & M. Thompson v. Harvey.

Comb. 122. S. C. & S. P. by Holt Ch. J.—S. P. the condition; as a bond *not to prosecute a felon*, and in the latter case an averment that the bond was given upon an unlawful condition may be good, if it be *consistent with the condition.* Show. 2. Pasch. 1 W. & M. Thompson v. Harvey.

11 Mod. 93. in case of Hacket v. Tilly.

17. Bond to enforce marriage order'd to be deliver'd up, for that marriage ought to be free. 2 Vern. 102. pl. 97. Trin. 1689. Key v. Bradshaw.

18. In

18. In debt on bond by administratrix of a sheriff, it did *not* appear either in the writ or declaration that he was sheriff; for the words *nuper vicecomes, &c.* were omitted; the defendant pleaded the statute that the bond was taken *colore officii, &c.* The plaintiff in her replication set forth a latitat brought against W. R. and the return, and the arrest by her intestate *ad tunc vic. &c.* and the bond given for appearance, &c. Upon demurrer it was resolved that the writ and declaration were ill, because the plaintiff's intestate was not therein named *nuper vicecom. &c.* 1 Lutw. 619. Mich. 13 W. 3. C. B. Prince v. Compton.

19. A bond conditioned to *commit maintenance* is void. Arg. 11. Mod. 93. Mich. 5 Ann. B. R.

20. A bond to *save B. harmless from an unlawful act already done* It is a good condition to save me harmless from all the ill things I have done, for that is no encouragement for me to do any more ill actions; but you are not to save me harmless from all the ill actions which I shall do, for that is an encouragement to me to do ill things, which is against the law; per Holt Ch. J. Holt's Rep. 203. in case of Hacket v. Tilly. J. 11 Mod. 93. Mich. 5 Annæ B. R. in case of Hacket v. Tilly.

21. Bonds *restraining* a man as to the *exercise of his trade* have been held void: but a *promise* upon consideration has been held good. See Tit. Actions (T) pl. 6. & Tit. Trade (F). But where the bond or covenant, or promise, is entered into

upon a fair, just, and reasonable consideration, and with no ill intention, it is good, and the difference is between those so enter'd into and such as are upon *no consideration, or a vicious one*, whether it be by bond, covenant, or promise, the former will be good, but the latter void; and tho' such bonds, containing no reason or consideration, is void *prima facie*, yet where the condition assigns a *just and fair reason*, the bond is good until that reason can be falsified; and therefore a bond restraining trade *all over England* is void, because some place may be found not to the prejudice of the obligee. 10 Mod. 130. adjudged, Michell v. Reynolds.—*As an apprentice taken without money* may be bound to pay a reasonable sum of money in case she instruct others, or set up within half a mile of her mistress. Wood's Inst. 52. cites anno 1727 in parliament, Cheesman v. Nainby.—MS. Tab. S. C. the bond was not to exercise the trade within half a mile of the plaintiff, and held good, the consideration being recited on the bond.

* But *within such a distance of his master* is a good agreement. Ibid. 138.

(X) *What condition shall be said against Law; and what shall be void. And e contra.*

See (U) S. P.

[1. Condition of an obligation to *release and set over an office for the war in Calais to whomsoever he pleases*; the obligation is void; but there the principle case is to whom it shall please the lieutenant; and it seems this is good; but Br. intends the obligee. 15 E. 4. 15.] Br. Pleadings, pl. 31. cites 15 E. 4. 14. S. C. & S. P. admitted. Br. Lieu. pl. 32. cites S. C. & S. P. admitted.

[2. Condition to *renounce an administration* is good. 15 E. 4. 30.] Br. Conditions, pl. 65. cites S. C.

[3. Condition to *do a thing which will be maintenance is void*, as to save J. harmless from such an appeal of robbery that B. hath against him; this is against law. 18 E. 4. 28.] Cart. 229. 230. Mich. 23 Car. 2. S. P. admitted per Cur. in case of Pearson v. Humes.

[4 The

* Br. Conditions, pl. 22. cites S. C. + Br. Condition, pl. 24. cites S. C. & S. P. admitted good. — Fitch. Barre, pl. 90. cites S. C. accordingly.

[4. The condition of an obligation was, that *if the obligee in an action in the name of C. recovers against R. at the costs of the obligee, C. should infeoff him of the land; and if he does not infeoff him, then the obligor shall be bound by the obligation is 20 l.* This is a condition against the law; for it is *maintenance* * 42 E. 3. 6. b. Quære but after + 23. the condition is admitted good; for the defendant had other matter to help him.]

{ Fol. 418. See (N) pl. 20. S. C.

[5. *A tenth granted by the clergy to the king, proviso that no parson (*) that is indicted in the court of the king shall pay any fine; and if he doth that he shall be discharged of the tenth; and a good proviso.* 21 E. 4. 46.]

[6. Lease for life upon condition that *if the lessee marries without licence, he shall re-enter, is a good condition.* 43 E. 3. 6.]

7. When a condition is *void by the maxims of the law*, 'tis as fully void to every intent as if it were made void by statute. Doct. and Stud. L. 1. Cap. 24.

8. Bond for appearance on *attachment out of Chancery* is void, because the defendant was not bailable on the attachment. 3 Le. 208. pl. 269. Mich. 33 Eliz. C. B. Bland v. Riccards.

Pl. C. 133. a. Arg. in case of Browning v. Beeston.

9. Bond by a baron with *condition to infeoff his wife.* The condition is void and against law, because it is contrary to a maxim in law, and yet the bond is good. Co. Litt. 206. b.

Mar. 192. Arg. S. P. of a covenant cites 7 E. 3. 65. [b. pl. 67. per Pam.]

10. Obligation by husbandman *not to sow his land*, is against the common law. Per Curiam. 11 Rep. 53. b. Mich. 12 Jac.

11. The baron enter'd into a bond conditioned *not to sell his wife's apparel*, and in debt brought thereupon it was objected that this was against law, because it is contrary to the liberty of the baron; but Coke Ch. J. held it clearly good. Roll. Rep. 334. pl. 43. Hill. 13 Jac. B. R. Smith v. Waton.

Co. Litt. 206. b. S. P.

12. If a baron binds himself to a stranger to pay 20 l. a year to his wife, this is good without doubt; per Coke Ch. J. Roll. Rep. 334. pl. 43. Hill. 13 Jac. B. R. in case of Smith v. Waton.

13. If in case upon 23 H. 6. 13. or the statute of usury, the condition of the bond should *recite* some matter that makes the bond good, yet if in truth the contract were *usurious*, or the condition not within the statute, and that *be pleaded*, it will avoid the bond, and the estoppel too. Hard. 465. in pl. 3. Trin. 19 Car. 2. in Scacc.

Lev. 209. Norfolk v. Elliot, S. C. and though the serjeant at arms of the House of Commons is not within the Stat. 23

14. The House of Commons had voted one Wogan guilty of high treason, and the plaintiff being a *serjeant at arms attending upon the house*, was order'd to take him into custody, who being taken into custody by virtue of that warrant, the defendant entred into this bond to the plaintiff, *conditioned for the said Wogan's appearance*, who did not appear; and hereupon debt being brought, the chief question upon a demurrer was, whether this was a void bond or not? And per Curiam it is void by the common law, for it was entred into for

case

Condition.

† 97

ease and favour of the prisoner; and it is no more than a bond to a sheriff to answer for an escape. And here Wogan was taken into custody for treason, for which he could not be bailed; otherwise if it were for an offence bailable. Hard. 464, 465. pl. 3. Trin. 19 Car. 2. Norfolk's case.

H. 6. yet if he takes a bond for enlargement of one in custody for treason, and this

appears upon the record, It is void by the common law. 1 Lev. 209 Pasch. 19 Car. * 2 in Scaec. Norfolk v. Elliot. Raym. 62. Norfolk v. Aylmer, S. C. adjournatur. Keb. 391. pl. 103. S. C. adjournatur.

* [98]

15. A bond condition'd to perform a bye-law has been ruled naught, per Hale Ch. J. obiter. Raym. 227. Mich. 25 Car. 2. B. R.

16. Bond to the marshal to be a true prisoner is good; but not to receive or take any thing of advantage or profit to himself; and that if he did, the bond was void at common law. 2 Salk. 438. Mich. 9 W. 3. B. R. Anon.

17. A. having a wife who lived separate from him, afterwards courted and married another woman, who knew nothing of the former wife's being alive; but it being discovered to the second wife that the former was alive, A. in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee of the second wife to leave her 1000 l. at his death, and dies, not leaving assets to pay his simple contract debts; if this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife, after such time as she knew the first wife was living, and to induce her to continue with A. this was worse than a voluntary bond. 3 Wms's Rep. 339. pl. 88. Mich. 1734. Lady Cox's case.

If such bond had been given to the second wife as a recompence for the injury done her, and thereupon had left A. it had been a good bond. 3 Wms's Rep. 340. in S. C.

18. Bonds and contracts to procure marriage are void. See Tit. Marriage (I) per Totum of Brocade bonds for procuring marriages.

(Y) The Effect of a Condition against Law.

[1. If a feoffment be of land upon condition to kill J. S. this condition is against law and void, but the feoffment is good, and not made void by it. Co. Litt. 206. b.]

But in case of an obligation with such a condition the

obligation is void as well as the condition. Br. Obligation, pl. 45. cites 2 E. 4. 2.

[2. If the condition be to do a thing against law, the obligation is void. 2 H. 4. 9. Co. Litt. 206. b.]

Br. Dette, pl. 51. cites S. C.

Br. Conditions, pl. 34. cites S. C. Fitzh. Obligation, pl. 13. cites S. C. Br. Obligation, pl. 20. cites S. C. the obligation and condition are both void. Br. Condition, pl. 127. cites 4 H. 7. 3. S. P. by Brian, Ch. J.

[3. As if it be to kill or rob J. S. 2 H. 4. 9. Co. Litt. 206. b.]

Br. Conditions, pl. 34. cites S. C. Br. Dette, pl. 51. cites S. C. Fitzh. Obligation, pl. 13. cites S. C. and 2 E. 4. and 3 E. 4. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. where Markham says, that in such case the condition is void, but the obligation single. But Brooke says, Quære inde; for he says it seems that both are void.

[4. So

Br. Conditions, pl. 34. [4. So if it be to save harmless a sheriff if he embezzles a writ that he hath against him. 2. H. 4. 9.]
cites S. C.

—Br. Dette, pl. 51. cites S. C. —Fitzh. Obligation, pl. 13. cites S. C.

Br. Conditions, pl. 34. [5. So if the condition be to save harmless a sheriff for the delivery of cattle taken in Withernam to one of the parties, for the sheriff ought to keep them till &c. 2. H. 4. 9. Com. * Diverman, 64. b.]
pl. 51. cites

S. C. —Fitzh. Obligation, pl. 13. cites S. C. —S. C. cited Hob. 14.

* This is misprinted, and should be Dive v. Man, alias Manningham, where it is cited by Moyle J.

Bond for deliverance of goods taken in Withernam is void. Lev. 209. Pasch. 19 Car. 2. per Cur. cites 2 H. 4. 9.

[99]

The law [6. If the condition be for doing a thing that is *malum in se*, this distinguishes is void, and makes the obligation void. Co. Litt. 206. b.]
between a

condition against law for the doing of any act that is *malum in se*, and a condition that concerns not any thing that is *malum in se*, but is therefore against law, because it is repugnant to the state, or against some maxim or rule in law; when therefore it is said, that if the condition of the bond be against law, that the bond itself is void, the common opinion is to be understood, of condition against law for the doing of some act that is *malum in se*; and yet therein also the law distinguishes; as if a man be bound upon condition that he shall kill J. S. the bond is void; but if a man make a feoffment upon condition that he shall kill J. S. the estate is absolute, and the condition void. Co. Litt. 206. b. —S. P. by Holt Ch. J. Comb. 246. Pasch. 6 W. & M. in B. R. in case of Carpenter v. Beer.

Hob. 14. 7. When some covenants in an indenture are void by the common law, and others good, an obligation made for performance of all the covenants stands in force for such as are good, but not for the other; but if any of the covenants are void by statute-law the obligation shall be void; for all the other covenants, according to Coleshill's case, and Twine's case, in 3 Rep. of Coke. Mo. 856, 857. pl. 1175. Mich. 11 Jac. resolved, in case of Norton v. Syms.
S. C. & S. P. resolved, for a statute is a strict law; but the common law divides according to common reason,

and having made that void which is against law, lets the rest stand, as is 14 H. 8. fol. * 15. —Godb. 112. pl. 303. S. C. adjournatur; but Coke Ch. J. seem'd clear of opinion that the bond was void, and said he conceived it had been adjudged before in B. R. in the same Norton's case v. Chamberlain. —Brownl. 64. S. C. and S. P. —Mod. 35. pl. 85. Twisden J. said he had heard lord Hobart say, that the statute is like a tyrant in such cases, where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest.

* This seems misprinted, for 25. 27. Br. Faits, pl. 37. cites S. C.

Cites * Co. Litt. 206. 8. All the instances of conditions against law, in a legal sense, are reducible under one of these heads; 1st, Either * to do *malum in se*, or *malum prohibitum*. 2dly, To omit the doing of something that is a duty. 3dly, To encourage such crimes and omissions. And such conditions as these the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes, and therefore, as in 1st inst. 206. a || feoffment shall be absolute for an unlawful condition, but a bond void; and, consequently, where a way may be found out to perform the condition without a breach of the law it shall be good; per Parker Ch. J. in delivering the opinion of the court. Wms's Rep. 189, 190. Hill. 1711. in case of Mitchell v. Reynolds. holds.

216. Perk. 139. Cart. 229. 2 Keb. 140. 153. —¶ Pal. 172. Fitzh. 13. —* Br. Condition 34. 2 H. 4. 9. Hob. 12. —¶ Perk. 778. 1 Rep. 22. a. Hob. 12. 3 Cru. 705.

¶ S. P.

[7] S. P. 10 Mod. 134. for in the one case, left the man should have any temptation to do the act the law secures to him the possession of the land without performing the condition, and in the other tries him from the penalty of the bond; so that the law has the same end in view either way, viz. the prevention of the fact.

9. Where part of the condition of a bond is lawful and the rest against law, it is good for what is lawful, and void for the rest; otherwise if the condition be entire. MS. Feb. December 4th. 1721. Yale v. the King.

For more of Conditions against Law, see Tit. Action (T), Officer and Offices (O. 3), Sheriff (T), Simony, Trade, Usury, and other proper titles.

(Y. 2) Against Law &c. Void. And Pleadings. [100]

1. **M.** Brought debt upon a bond which was indorsed upon condition to pay a less sum; the defendant pleaded the statute of 13 Eliz. that all covenants, contracts and bonds, made for the enjoying of leases made of spiritual livings, by parsons &c. were void; and averred that that bond was made for enjoying of such a lease; but because the condition expressed in the bond was for payment of money, the justices held it clear for law that the bond was good, and out of the statute; and so it was adjudged. Godb. 29. pl. 38. 27 Eliz. C. B. Macrowe's case.

2. Where the condition of an obligation shall be said against the law, and therefore the obligation void, the same ought to be intended where the condition is expressly against the law in express words, and *in terminis terminantibus*, and not for matter out of the condition; agreed per tot. Cur. Le. 73. pl. 99. Mich. 29 & 30 Eliz. Brook v. King.

3. As in debt on a bond the defendant pleaded, that the bond was indorsed with such condition, viz. That if the said defendant King shall procure one J. S. to make reasonable recompense to the plaintiff for certain beasts which he wrongfully took from the plaintiff, that then &c. and he said in fact, that the said J. S. had stolen the said beasts from the plaintiff, and thereof he was indicted, &c. and so the condition being against the law, the obligation was void, upon which the plaintiff did demur in law. Le. 73. pl. 99. Mich. 29 & 30 Eliz. Brook v. King.

4. Bond conditioned not to give evidence against a felon is void; S. C. cited but the defendant must plead the special matter. Le. 203. pl. 281. Hill. 31 Eliz. C. B. Jone's case.

which was an action of debt upon a bond of 20l. the defendant demanded oyer of the condition, which was, that the obligee should not himself bring any evidence at the assizes to prove the 2 cows now in question, between one Owen Mason the younger, and the said Watkins, to be the cows of the said Watkins, or of Robert Gillo; and that the said Gillo shall set in a bill of *ignoramus*, that then the bond should be void. The defendant pleaded *quod ipse de debito præd' virtute scripti obligat prædict' onerari non debet*; because that one of the said cows was the cow of the said Watkins, and the other of the said Gillo; and that before the bond, Owen Mason, jun. in the said condition mentioned, being the plaintiff's son, stole the said 2 cows and was imprisoned thereupon; and the defendant Watkins was bound by recognizance to prosecute him at the assizes for the said felony; and there the said Mason, junior,



junior, was indicted and convicted, and the defendant did give evidence that one of the cows was his, *probat bene sinit*, and that the defendant did not give any evidence by himself, or any one else, to prove the 2 cows to be the cows of the defendant, or the cows of the said Gillo, *Et hoc paratus est verificare, &c. unde petit judicium, &c.* To this the plaintiff demurred, and upon the first opening judgment was given for the defendant; for the condition is against law, viz. to shift off evidence of felony, and that makes the bond void, and the court recommended it to serjeant Pawlet, who was a judge in *Wales* where the plaintiff lived, to see to have him prosecuted for taking such a bond.

Eyre Ch. J. 5. In debt on bond, defendant pleaded, that 'twas given for *comm-ask'd why should not this matter which avoids this* pounding felony, but this being a *matter dehors* judgment was given for the plaintiff. Gibb. 73. Trin. 2 & 3 Geo. 2. C. B. Andrews v. Eaton.

bond by the *common law* be as well *pleadable* as a matter which by *statute law* is declared to make a devise void which is allowed to be pleaded in bar, tho' nothing of it appear in the condition? Ibid 75. but judgment was given as above.—The statutes of *simony, usury, and sheriff's bonds give averments* in such cases, but no statute gives averment in case of *maintenance*. Jenk. 108. pl. 9.—So a plea, that the bond was for *maintenance* as upon buying of debts due to obligee. Jenk. 108. pl. 9. 37. M. 6. 13.

[101] (Z) What Condition shall be said repugnant. *Repugnant to the Estate.*
See Tit. Perpetuity.

Fitzh. Con- [1. *A Gift in tail, or in fee, upon condition that the feme shall not dition, pl. 12. cites S. C. & S. P. by Wilby, and* *be endowed, or that the baron shall not be tenant by the curtesy*, is repugnant. *Co. 10. 38. b. 22 E. 3. 19. b.]

agreed by Shard —But if land be given by A. to baron and his heirs, rendering a rose for his life, and afterwards his heirs to render certain rent, and that if the rent be arrear that A. may enter; If, after the baron's death the rent be arrear, the feme shall not have her dower; per Tot. Cur. Fitzh. Condition, pl. 12. cites S. C. but says that afterwards, Trin. 34 E. 3. it was awarded that she recover, but that execution cease till the age of the heir; and per Tot. Cur. if the heir was of full age, and the feme had been endow'd, yet if afterwards the heir dies, and his heir be within age, the rent of the feme shall cease for the time, and cites 5 E. 3. accordingly.—6 Rep. 41. a Mich. 3 Jac. in Mildmay's case, S. P.—2 Brownl. 67. S. P.—Co. Litt. 224. a S. P.—D. 343. b. pl. 58. S. P.—Jenk. 243. in pl. 26. S. P. * 10 Rep. 38. b. 39. a S. P.

* Co. Litt. [2. *So upon condition that he shall not make a * lease within 32 223. b. says that such condition is good; for the statute* *H. 8. or levy a fine within 4 H. 7. or that he shall not suffer a * common recovery, or that he shall not make any conclusion to suffer a recovery*, is repugnant. Co. 10. 38 b.]

gives him power to make such leases which may be restrain'd by condition; for this power is not incident to his estate, but given him collaterally by the act, according to the rule of quilibet potest renunciare juri pro se introducto.—Jenk. 243. pl. in 26. says it is repugnant.

A devise to A. and the heirs male of his body, proviso, that if he does attempt to alien, then immediately his estate shall cease, and B. shall enter. The court held the condition void; for a man cannot be restrained from an attempt to alien; for non constat what shall be judged an attempt, and how can it be tried: And when the express words are so, there shall not be made another sort of condition than the will imports; and so a judgment was affirm'd. Vent. 321, 322. Mich. 29 Car. 2. B. R. Pierce v. Win.—Pollexf. 435. S. C. argued.—3 Keb. 787. pl. 41. S. C. adjournatur.

† 10 Rep. 39, a. S. P.—6 Rep. 41. a. in Mildmay's case. S. P. resolv'd.—Co. Litt. 224. 2. S. P.

Co. Litt. [3. *So upon condition that he shall be punished in waste, or that 224. a. S. P. 6 Rep. 41. a. S. P.* *tenant after possibility shall, or that a collateral warranty shall not bind,* is void. Co. 10. 39.]

The reason [4. *But a condition that he shall not alien in fee, in tail, or for that when he makes such aliena- life of another*, is good. Co. 10. 39. Mich. 3 Jac. B. R. Mildmay's case, resolved. * 33 Aff. 18 Curia.]

tion, he acts contrary to the intent of the donor, for which the statute of Westm. 2. Cap. 1. was made, whereby estates tail are ordain'd. 10 Rep. 39. a. in Portington's case. Trin. 9 Jac. cites Litt. S. 362. But says that common recovery is not contrary to the said act, nor to the intent of the donor within the purview thereof; but Littleton's meaning is, that tenant in tail may be restrained from making a discontinuance in fee, or in tail, or for another's life.

* Br. Conditions, pl. 116. cites 33 Aff. 11. S. P. — Fitzh. Condition, pl. 16. cites S. C. [There is no pl. 18.]

[5. So to restrain a fine by the common law. Co. 10. 42.]

Br. Conditions, pl.

239. cites 10 H. 7. 11. S. P. because it is contrary to the estate.

[6. A gift in tail, upon condition that the donee may alien for the profit of the issue, is a good condition. 46 E. 3. 4. b.]

Co. Litt. 224. b. S. P.

[7. A condition upon a feoffment in fee, that his daughters shall [not] inherit, is not good. Da. 1. 34. b.]

It is against the nature of a fee

simple to exclude the heir female upon failure of heir male, and therefore such proviso on such feoffment is void. Dav. 34. b.

[102]

[8. It is a good condition of a statute, that he alienera null terre * a vendre, nor do other thing que luy poit turner in vileny, without his counsel. 46 E. 3. 32. b.]

* The words (a vendre) seem to mean that

he should not sell any — The case was, viz. in debt, the defendant pleaded a defeasance, that if he did not alien any land, nor do any other thing which might turn him into villeny, without his counsel, then the obligation should be void, and said that he had performed all the covenants. The plaintiff replied that he alien'd certain lands to J. S. and also entred into a statute merchant to W. R. and so the covenants broken and pray'd his debt. The defendant rejoind'd that he had given to his heir apparent certain land without taking any thing, and demanded judgment, and that as to the statute this cannot turn him into villany, and demanded judgment, &c. Mich. 46 E. 3. 32. b. 33. a. pl. 42.

[9. [So] if a man leases a mill for years, upon condition that he shall not lease it to any except to one of the villeins of the lessor, or to a miller. 38 E. 3. 33. b. admitted.]

[10. If A. being leased in fee of land, leases it to B. for 99 years, if he so long lives, the remainder to C. for 99 years, if he so long lives; and after A. demises it to C. and D. for 99 years, if 3 others or any of them so long live, to begin after the determination of the first estate, upon condition that if C. and D. both (*) die either before the beginning of the term, or before the end of the term, that then it shall be lawful to the lessor to re-enter; this is a good condition, for this is not repugnant to the estate, nor to the limitation; but this is a collateral contingent thing, that shall give cause of re-entry. Hill. 15 Car. B. R. between Potter and Oldreave, per Cur. adjudged upon demurrer. Intratur. Mich. 15 Car. Rot. 375.]

* Fol. 419.

11. If a man aliens in fee upon condition, that if the feoffee or his heirs make any assignee, that the feoffor or his heirs may enter, this is a void condition; for it is repugnant to the estate; Per Grene. Br. Conditions, pl. 116. cites 33 Aff. 11.

12. A. makes a feoffment of land to B. with warranty, proviso that the warranty shall be void, this is a void proviso; but if the proviso leaves any benefit of this warranty to the feoffee, as if it be that he shall not vouch the feoffor, it is a good proviso, because he leaves him a right to rebut him. Jenk. 96. pl. 86.

As in a deed, and proviso, which is repugnant to the proviso is void for both being in one

instrument, where the latter clause is repugnant to the former, the latter is void.

13. A *lessee* may be restrain'd by condition not to alien, but not if the lease be to him and his assigns; per Hobart Ch. J. Arg. Hob. 170. cites 21 H. 6. 33.

14. If land be given in tail, the remainder over to the right heirs of the tenant in tail, upon condition that if he or his alien in fee, the donor or his heirs may enter. This was held a good condition by all the justices, notwithstanding the fee simple in the reversion; and a diversity was taken between a fee simple in possession and fee simple depending upon another estate. Mich. 11 H. 7. 6. b. pl. 25. says, that it was so held by all the justices in C. B. Trin. 8 H. 7.

Whatsoever is prohibited by the intent of any act of Parliament may be prohibited by condition. Co. Litt. 224. a.

16. As to make a *feoffment*, proviso that the *feoffee* shall not do felony. Br. Conditions, pl. 339. cites 10 H. 7. 11.

* This is good to restrain alienations during his minority, but not after his full age. Co. Litt. 224. a.

† Co. Litt. 223. b. S. P. because such alienation is prohibited by law; and regularly whatsoever is prohibited by law, may be prohibited by condition, be it *malum prohibitum*, or *malum in se*.

‡ [103]

18. And a man may *infeoff* another and his *feme* upon condition that they shall not *infeoff* any by deed; for this is discontinuance. Br. conditions, pl. 339. cites 10 H. 7. 11.

19. And where land is given in tail, the remainder in fee upon condition, that if the donee or his heirs alien in fee that the donor or his heirs may enter. Ibid. Brooke says, it seems that the remainder in fee was to the same tenant in tail. Ibid.

* Br. Estates, pl. 31. cites S. C. that it was adjudged frankfelement in the grantee. — Quere if the other cases are not mis-cited.

20. If land be given to A. and his heirs so long as J. S. has heirs of his body, the donee has fee and may alien it, notwithstanding there be a condition that he shall not alien. 2 And. 138. Arg. cites 13 H. 7. 11 H. 7. 21 H. 6. 37. and says the law seems to be plain in it; and cites * 11 Aff. 8. where the S. C. is put and held as before, and that there if the land be given to one and his heirs so long as J. S. and his heirs shall enjoy the manor of D. those words (so long) are entirely void and idle, and do not abridge the estate.

Br. Prerogative, pl. 38. cites 21 H. 7. 7. S. P. & S. C. —

21. If the king grants land in fee upon condition that the grantee shall not alien to any, it is a good condition; for it shall be taken most beneficial for the king, and most strong against the grantee. Br. Conditions, pl. 82. cites 21 H. 7. 8.

Br. Prerogative, pl. 102. cites S. C. — 5 Rep. 56. a. S. C. cited in Knight's case. — And so it is in the King's case at this day, because he may reserve a tenure to himself. Co. Litt. 223. a. — A man before the statute of *quia emptores terrarum* might have made a *feoffment* in fee, and added further, that if he or his heirs did alien without licence, that he should pay a fine, then this had been good. Co. Litt. 223. a. — And so it is said, that then the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter. Co. Litt. 223. a.

Br. Prerogative, pl. 102. cites S. C. — Ibid. —

22. But if a common person makes a *feoffment* upon condition that the *feoffee* shall not alien, it is a void condition. Br. Conditions, pl. 82. cites 21 H. 7. 8.

pl. 38. cites S. C. ——— S. P. But gift in tail upon condition that the tenant shall not alien to any is good, by reason of the reversion in the donor; per Fairfax and Hussey. Br. Conditions, pl. 135. cites H. 7. 10.

23. A lease for years was made to A. and his assigns, provided that he should not assign the term. The proviso was void. But if the grant had not been to him and his assigns the proviso had been good; Per Hobart Ch. J. Mo. 881. in case of Stewkley v. Butler, cites D. 9 Eliz. 264. and 21 H. 6. 33. Hob. 170. S. P. per Hobart, in S. C.

24. A condition annex'd to an estate tail, that the donee shall not marry, is void; for without marriage he cannot have an heir of his body; but it is otherwise of a fee pals'd upon such condition, for the collateral heir may inherit. Jenk. 243. in pl. 26. S. P. as to the not marrying by Dyer, accordingly. quod Man-

wood and Wray concesserunt. D. 343. b. pl. 58. Trin. 17. Eliz.

25. Lease of lands to A. for 20 years, proviso *not to occupy the same the two first years*, is void and contrary, and repugnant to the estate. Arg. quod fuit concessum, per Curiam. Le. 132. pl. 176. Trin. 27. Eliz. in Scacc. obiter.

26. A. seised of lands, devised the same to his eldest son, and the heirs male of his body, the remainder to his second son, and the heirs male of his body, and so to the third son, the remainder to his daughter in tail general, with remainder over, proviso, that if any of the devisees, or their issue, shall go about to alien, discontinue, and incumber the premises, that then, and from the time that they shall so go about to alien, discontinue, &c. their estate shall cease as if they were naturally dead; and from thenceforth it shall be lawful for him in the next remainder to enter, and hold for the life of him who shall so alien, &c. and presently after his death the land shall go to his issue, &c. The deviser dieth, the eldest son, and all the other but the second son, levy a fine; the second son claims the said land by the devise. It was resolved in this case, by all the justices, that the proviso of ceasing of the estates upon an attempt to alien, or upon an alienation, was repugnant, and that the remainder limited to the second son upon such attempt was void in law; and the same was agreed by all the justices in England on a conference with them; and judgment accordingly against the second son who brought the action. Mo. 364. pl. 495. Hill. 33 Eliz. Germin. v. Ascott. [104]
And. 186. pl. 222. S. C. adjournatur. — 2 And. 7. pl. 6. S. C. adjudg'd accordingly. — 4 Le. 83. pl. 176. Jermaine v. Arscot, S. C. says, that judgment was given against the plaintiff; for by the will here is a good limitation, and an estate to cease upon an act, and upon another contingent to be re-

viv'd is good enough. — 1 Rep. 85. a. b. S. C. cited by Anderson Ch. J. — S. C. cited Mo. 471. pl. 678. Mich. 39 & 40 Eliz. in Tarrant's case, like point, but no judgment. — S. C. cited Mo. 544. in pl. 751. and Mo. 633.

27. C. seised of lands, covenanted for natural affection to stand seised to the use of himself for life, and after to the use of R. and the heirs male of his body, the remainder to A. and the heirs male of his body; provided if R. or any heir male of his body, shall intend or go about any act to cut off the estate tail, then it shall be lawful for him that is next to enter. C. died. R. suffered a common recovery. A. enter'd. Resolved the proviso was repugnant to the estate tail, and that the cesser of the estate tail, as if the party had been dead, was impossible, and the going about it is such a secret thing that an 2 And. 134. pl. 82. S. C. adjudged. — 1 Rep. 83. b. S. C. adjudged per tot. Cur. — S. C. cited Mo. 433.

issue cannot be upon it. Mo. 601. pl. 831. Hill. 41 Eliz. Corbet v. Corbet.

6 Rep. 402. Mich. 3 Jac. B. R. the S. C. adjudged according to the opinion of Anderson and Kingmill. 28. Sir W. M. the father, in consideration of love and affection, covenanted to stand seised of lands to the use of himself for life, without impeachment of waste, the remainder to A. his son, and the heirs male of his body, the remainder to H. and the heirs male of his body. *Provided if any of the said parties shall go about, resolve, determine, or devise to do any act, or shall consent to any act whereby the estates of them in remainder shall be aliened, discontinued, barred, &c. then his remainder shall cease as if he were naturally dead, and not otherwise.* Sir W. died, A. entered and suffered a common recovery. Kingmill and Anderson held that the proviso was repugnant and not issuable, but Walmsley and Warburton e contra. Mo. 632. pl. 868. Pasch. 43 Eliz. C. B. Mildmay v. Mildmay.

* Godb. 299. S. P. by Hobart Ch. J. Arg. — S. P. Arg. 206. b. 20. Feoffment on condition that *feoffee* * *shan't take the profits* of the land. The condition is repugnant, and against law, and the estate is absolute. But a bond with such condition is good. Co. Cro. E. 107. pl. 1. cites 6 R. 2. Quid Juris clamat. 20. — A lease was made to A. B. and C. by tenant in tail, proviso that if C. shall demand, &c. any profits of the lands, &c. or enter into the same during the life of A. or B. (his father and mother) that then the estate limited to C. by the said indenture should cease, and be utterly void. Per Cur. this condition and proviso is utterly void; for 'tis contrary to the estate limited before. 2 Lc. 132. pl. 176. Trin. 27 Eliz. in Scacc. Moore v. Savill.

An elder brother voluntarily gave land to his 2d brother and the heirs of his body, with remainder to a younger brother in tail, and made each of them * to enter into a statute with the other that he would not alien, &c. but because those statutes were in substance to make a perpetuity, which the statute of England cannot allow, therefore the statutes by decree of chancery with the advice of Ld. Ch. J. Coke were annulled. Cited by the lord Chancellor. Mo. 810. in case of Tatton v. Moineux, as 6 Jac. Poole's case. — S. C. cited 2 Vern. 251. pl. 237. per Cur. Hill. 1691. in case of Jervis v. Bruton, where the case was, that A. settled lands on B. in tail, remainder to his own right heirs, and takes a bond of B. not to do waste. B. levied a fine, and afterwards committed waste, and the bond being put in suit, it was decreed to be deliver'd up to be cancelled, and said it was an idle bond.

A. settled land on B. his son in tail, B. gives A. bond not to dock the entail; decreed the bond good. Had not B. agreed to give the bond, A. might have made him only tenant for life; and tho' the alienation is not made by B. but by his issue, yet the bill for relief against the bond was dismissed with costs. 2 Vern. 233. Trin. 1691. Freeman v. Freeman. — Chan. Prec. 28. pl. 31. S. C. thus, a man enters into bond that his son, who was tenant in tail, shall not alien, and dies; the son suffers a common recovery, and thereupon the bond being put in suit, the bill was brought for relief, but was dismissed with costs. — Tenant in tail after 32 H. 5. gives bond or recognizance not to lease for 21 years, or 3 lives. If he make such lease the lease is good, but the bond, &c. forfeited. Jenk. 120. pl. 41.

* [105]

31. If a man be seised of a feignory rent, advowson, common, or any other inheritance that lies in grant, and by his deed grants the same to a man and his heirs, upon condition that *he shan't alien*, this condition is void. Co. Litt. 223. a.

As to a particular person it is good. Arg. 3 Lc. 282. 32. If a feoffment in fee be made upon condition that the *feoffee* *shall not infeoff* J. S. or any of his heirs or issues &c. this is good; for he does not restrain the feoffee of all his power, and in this case if the feoffee *infeoff* J. N. of intent and purpose, *that he shall infeoff* J. S. some hold that this is a breach of the condition; for quando aliquod

aliquod prohibetur fieri, ex directo, prohibetur & per obliquum. Co. Litt. 223. b.

33. If a feoffment be made upon condition that the *feoffee shall not alien in mortmain*, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by law may be prohibited by condition, be it *malum prohibitum* or *malum in se*. Co. Litt. 223. b.

34. If a man make a *feoffment to a baron and feme* upon condition that they *shall not alien*. To some intent, this is good, and to some intent it is void; for to restrain an alienation *by feoffment*, or by deed, it is good, because such alienation is tortious and voidable; but to restrain their alienation *by fine* is repugnant and void, because it is lawful and unavoidable. Co. Litt. 224. a.

35. It is said that if a man *infeoff an infant* in fee upon condition that he shall not alien, this is good to restrain alienations during his minority, but not after his full age. Co. Litt. 224. a.

36. If a man makes a *gift in tail to A. the remainder to him and to his heirs*, upon condition that he shall not alien, as to the estate tail, the condition is good, for such alienation is prohibited by the statute W. 2. Cap. 1. But as to the fee simple, some say it is repugnant and void, and therefore some are of opinion that this is a good condition, and shall defeat the alienation for the estate tail only, and leave the fee simple in the alienee; for that the condition did in law extend only to the remainder. Co. Litt. 224. a. But by special limitation, it may extend to any one of them, and not to the other. Co. Litt. 230. b.

37. Tenant in tail in the same deed, in which he creates the *intail*, covenants not to dock the *intail*, or suffer a recovery. Chancery will not decree a specific execution; for the covenantees knew he had a power to bar, and therefore accept of a covenant by which to have damages. Per Cowper C. 2 Vern. 635. pl. 563. Hill. 1708. Collins v. Plummer.

(A. a) Repugnant to the Grant.

[106]

[1. *A* Tenth granted by the clergy, proviso that no parson that is indicted in the court of the king shall pay any fine, and if he does he shall be discharged of the tenth* is a good proviso. So if exchequer be made, proviso the collectors shall not account in the such grant before the barons, but before special auditors assigned by the king, this is a good proviso. 21 E. 4. 46.] * In Roll. it is a (fifteenth) but in the year-book it is a (tenth.)

[2. If a man makes a *feoffment in fee, provided that the feoffor shall have the profits*, this condition is void, because it is repugnant to the grant. 17 H. 6. 43. b.] It seems that this should be 7 H. 6. 43. b [pl. 21. per June]

—Perk. S. 731 S. P. — A feme made a lease of mills in Kent, with an exception, that she should have the profits for her life, and it was greatly debated, whether this exception was good or not, because the profits of the mills are all the benefit, and in effect the mills themselves, and at last the exception was adjudged good in law, and that the feme should have the profits; cited by Manwood as a case which happened in Kent. Pl. C. 524. b. — See 3 Le. 111. S. P. in a question put by Manwood Ch. B.

[3. If a man for himself and his heirs warrants lands to another and his heirs against all men, proviso taken, that the warranty shall *be* Note, by all the justices in the Ex-

chequer be void, this proviso is altogether repugnant to the grant, and
Chamber, therefore the grant is good and the proviso void. Contra 7 H. 6.
except June, If a man 43. b.

make: a
feoffment with warranty, provided always that he shall not vouch him nor his heirs, and that if he does,
that the warranty shall be void, this is a good proviso; as in case of grant of an annuity, provided
always that the grant shall not extend to charge his person, but his lands and tenements, &c. Br. Con-
ditions, pl. 51. cites 7 H. 6. 44. S. C. — But if it was, provided, &c. that he shall not vouch nor re-
but, this is void; for this cuts off all the force of the warranty; Contra supra; note a diversity.
Ibid. — Br. Garrantes, pl. 30. cites 7 H. 6. 43. S. C.

Br. Garrantes, pl. 30.
cites S. C.
says it was
he is good by
as the Justices,
præter June.

[4 So it seems in the case aforesaid, if the proviso had been, that
he to whom the warranty was made, nor his heirs, should not have
in value by force of the warranty, that the proviso is not good; yet
he may rebut, if the proviso be good, and so the warranty not wholly
defeated; but it seems it is not a good proviso, because then the
words (against all men) would be wholly defeated; for the other
words will give a rebutter without them. Contra 7 H. 6. 43. b.
by all the justices præter June and Hank.]

5. If the condition be that the feoffee shall not do waste, it is not
good, for no right or interest remains in the feoffor. Br. Condi-
tion, pl. 57. cites 21 H. 6. 33. Per Yelverton.

6. But lease for years, upon condition not to grant over, the same
is good, because the reversion remains in the lessor. Ibid.

S. P. per
Montague
Ch. J. but
he said that
such a co-
venant is
good. Cro. J.

7 If a feoffment be made upon this condition, that the feoffee
shall not alien the land to any, this condition is not good. But
contra that he shall not alien to W. S. Br. Condition, pl. 135. cites
8 H. 7. 10.
J. 596. in case of Broad v. Jolliffe. — When a man is enfeoffed, he has power to
alien to any person by the law, for if such a condition should be good, then it would oust him of all
the power which the law gives him, which would be against reason, and therefore such a condition is
void. Litt. S. 360.

But a con-
dition that
he shall
not suffer a
common re-
covery is void
as repugnant
to the grant.
Jenk. 243.
pl. 26. —
But a con-
dition annexed to any particular estate, as for years, life, or in tail, that he shall not commit felony,
treason, or any treasonable act is good. Jenk. 243. pl. 26. — And that the tenant in tail shall
not discontinue the estate tail. Jenk. 243. pl. 26. — Br. Condition, pl. 57. cites 21 H. 6. 33. —
And that he shall not levy a fine of it sur consonans de droit come esso, is a good condition; for it restrains
the discontinuance of a reversion, which is a wrong. Jenk. 243. pl. 26.

8. A gift in tail, upon condition that the tenant shall not alien to
any, is good by reason of the reversion in the donor. Br. Condi-
tion, pl. 135. cites 8 H. 7. 10. Per Fairfax and Hussey.

* 9. So if condition be, that he nor his heirs shall not alien in
fee, nor in tail, nor for term of another's life, but only for their own
lives &c. such condition is good; for such alienation and disconti-
nuance of the intail, is contrary to the intent of the donor, for
which the statute of Westm. 2. Cap. 1. was made. Litt. S. 362.

But a con-
dition annexed to any particular estate, as for years, life, or in tail, that he shall not commit felony,
treason, or any treasonable act is good. Jenk. 243. pl. 26. — And that the tenant in tail shall
not discontinue the estate tail. Jenk. 243. pl. 26. — Br. Condition, pl. 57. cites 21 H. 6. 33. —
And that he shall not levy a fine of it sur consonans de droit come esso, is a good condition; for it restrains
the discontinuance of a reversion, which is a wrong. Jenk. 243. pl. 26.

*[107]

10. Two feoffees granted *custodiam parci* of A, to W, N. ca-
piendo feodo quod J. S. nuper parcarius cepit proviso quod scriptum
non extendat ad onerandum one of the grantors, and this proviso was
held void; for this restrains all the effect of the grant against him.
Br. conditions, pl. 238. cites 10 H. 7. 8.

11. Lease for 2 years, proviso that he shall not occupy it for one
year, is repugnant and void. Cro. E. 107. pl. 1. Arg. cites 21
H. 7.

12. Lands

12. Lands were given in tail, upon condition *if the donee or his heirs discontinue the land, the donor shall re-enter*; the donee hath issue 2 daughters, and dies; the daughters have issue 2 sons, and die; one of the sons discontinues the land to another [to the other] and it was held by the court to be a breach of the condition. *Cro. E. 35. pl. 2. Mich. 26 & 27 Eliz. Croker v. Trevithin.* Le. 292. pl. 400. Anon. S. C. but is that one of the daughters levied a fine sur conuſance de droit come

ceo, &c. to her ſiſter. Adjudged per tot. Cur. to be a forfeiture.

13. A gift in tail is made of a walk in a foreſt, proviſo and the donee covenanted that he ſhould not fell any trees there, being timber trees. This proviſo is a condition, altho' a covenant is alſo added to this purpoſe: by all the judges of England. Note, this was a walk in a foreſt, but in a gift in tail of land out of the foreſt, provided that he ſhall not fell any timber trees growing upon the ſaid land, the proviſo is void; for the law gives him power to commit waſte if he will, as well as the tenant in fee. *Jenk. 266. pl. 73.*

14. A man before the ſtatute of *quia emptores terrarum*, might have made a feoffment, and added farther, that if he or his heirs did alien without licence, that he ſhould pay a fine, then this had been good, and ſo 'tis ſaid, that then the lord might have reſtrained the alienation of his tenant by condition, becauſe the lord had a poſſibility of reverter. *Co. Litt. 223. a.*

15. If A. be ſeiſed of Blackacre in fee, and B. infeoffes him of Whiteacre, upon condition that A. ſhan't alien Blackacre, the condition is good, for the condition is annexed to other land, and ouſts not the feoffee of his power to alien the land whereof the feoffment is made, and ſo no repugnancy to the ſtate paſſed by the feoffment, and ſo 'tis of gifts or ſales of chattles real or perſonal. *Co. Litt. 223. a.*

16. If a man be poſſeſſed of a leaſe for years, or of a horſe, or of any other chattle real or perſonal, and give or ſell his whole intereſt or property therein, upon condition that the vendee ſhan't alien the ſame, the condition is void, becauſe his whole intereſt and property is out of him, ſo as he has no poſſibility of a reverter, and 'tis againſt trade and traffick, and bargaining and contracting between man and man, and likewise it ſhould ouſt him of all power given to him. *Co. Litt. 223. a.*

17. If a man make a gift in tail, upon condition that he ſhall make a leaſe for his own life, albeit the ſtate be lawful, yet the condition is good, becauſe the reverſion is in the donor; as if a man make a leaſe for life or years upon condition that they ſhan't grant over their eſtate, or let the land to others, this is good, and yet the grant or leaſe ſhould be lawful. *Co. Litt. 223. b.* [108]

18. If one grant a rent-charge with a proviſo, that neither the ſaid grant, nor any thing therein contained, ſhall charge his perſon with a writ of annuity, by ſuch proviſo the land only is charged; and tho' there be 2 negatives in ſuch proviſo, yet they ſhall not make an affirmative againſt the manifeſt intent of the party. *Hawk. Co. Litt. 219.* Litt. S. 220. Co. Litt. 146. a.

Co. Litt.
246. a.

19. But a proviso that would take away the whole effect of the grant, as if one grant a rent out of land in which he has nothing, provided that it shall not charge his person, is void. Hawk. Co. Litt. 219.

Co. Litt.
2. 6. a. b.—
Popph. 87.
S. P. per
Curiam.—
6 Rep. 41.
b. S. P. per
Cur.—

3 Danv. 24.
pl. 7. cites
this case and
says, that he
supposes it

was put in the book as at common law, for the executors of such tenant for life may at this day dis-
train by 32 H. 8. cap. 37.

20. So is a proviso that is repugnant to the express words of the grant; As where one grants a rent-charge out of land, provided that it shall not charge the land, and where a proviso is good at first, and afterwards it happens that the grantee, or his executors, can have no other remedy but that which was restrained, they shall have it notwithstanding such restraint; as if A. grant a rent to B. for life, with a proviso that it shall not charge his person, yet B's executors shall have an action of debt for the arrears during B's life. Hawk. Co. Litt. 219, 220.

Lease for 2
years, pro-
viso, that
lessee shall
not take the
profits is repugnant and void. Arg. Cro. E. 107. pl. 1. cites 6 R. 2. Quid Juris clemat, 20.

21. If land is given to A. and B. provided that B. shall not take any of the profit; this proviso is void and repugnant; per Yelverton J. Obiter. Bullst. 42. Mich. 8. Jac.

22. A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in any thing expressed, nor in any thing implied, which is of its nature incident and inseparable from the thing granted; per Hobart Ch. J. Hob. 170. pl. 125. Hill, 12 Jac. in case of Stukely v. Butler,

(B. a) Condition repugnant. [By reason of the Intent.]

[1. IF the condition be, that if the obligee shall pay to J. S. 10 l. such a day, then the obligation, being 100 l. shall be void, otherwise not: though this was not the intent of the parties, yet the condition is good; for if the obligee does not pay 10 l. the obligation is forfeited. 39 H. 6. 9. b.]

Br. Condi-
tions, pl. 98.
cites S. C.
—Br. Obli-
gations, pl.
42. cites
S. C.—
S. C. cited
Arg. Saund.
66.—

2 Mod. 285.

Hill. 29 & 30 Car. 2. C. B. the Ch. J. said he doubted whether that case was law.—Freem. Rep. 247. pl. 261. Hill. 1677. Mills v. Wright, the condition was held absurd, and judgment for the plaintiff.—See Tit. Obligation (M) pl. 4. (N) pl. 1.—S. C. cited Arg. 11. Mod. * 193. but was denied by Holt Ch. J. to be law.—Ibid. 199. pl. 16. Mich. 7 Ann. B. R. in case of Wells v. Ferguson, S. P. adjudg'd to be repugnant, and denied this case to be law.—2 Saik. 463. pl. 3. Wells v. Tregufon, S. C. adjudg'd accordingly.

* [109]

3. A.

3. A. made a lease to B. on condition, *that if A. grants the reversion then B. shall have fee.* If A. grants the reversion by fine B. shall not have fee; for the condition is repugnant and void; per Anderson Ch. J. 1 Rep. 84. b. Pasch. 42 Eliz. C. B. cites 6 R. 2. Quid juris clamat 20. Plefington's case.

that if A. died within the term B. should have franktenement, and livery of seisin was made accordingly, and the condition was held repugnant.——S. C. cited Pl. C. 26. a. that it was held, that inasmuch as the condition preceded the franktenement, that the franktenement is not out of the tenor immediately.——S. C. cited Pl. C. 487. 2—Co. Litt. 378. b. (r) S. P. as of a lease for life, and says, that when the fine transfers the fee to the conusee, it would be absurd and repugnant to reason, that the same fine should work an estate in the lessee; for one alienation cannot vest an estate of one and the same land in two several persons at one time.——Perk. S. 729. S. C. and S. P. but ibid. S. 730. says, if the lessor had granted the reversion to a stranger by deed, the lessee in such case should have fee by the condition, because the reversion is not in the grantee before attornment, and yet the lessor has granted the same, and against this grant he cannot plead ne granta pas by the deed.——2 Brownl. 227. Arg. cites Plefington's case as held that he shall not have fee, because at the time he had only a right to a term, and not a term in possession.——If a man makes a lease for years upon condition, that if the lessor ousts him within the term he shall have fee; in this case, by the performance of the condition he shall have fee, because it is the act and tort of the lessor himself, whereof he himself shall not take advantage; and also, that eodem instante that the lessor ousts him, eodem instante the lessee has fee, and the title of the lessee is by force of the condition, which is paramount the ouster; per Coke Ch. J. 8 Rep. 76. a. and says, that with this accords 6 R. 2. Quid juris clamat 20. And that possession at an instant is sufficient to support the increase of the fee appears 12 E. 2. Tit. Voucher 265.——S. C. cited Co. Litt. 217. a.

4. Condition of a bond that *the obligee shall not sue the obligation*, is repugnant, but a defeasance by other deed to such effect is good. Mo. 811. pl. 1097. cites 21 H. 7. the case of Pufeto.

5. A bond was conditioned, that if *J. B. the obligor shall die without issue, then if he, by his last will, or otherwise in writing, shall convey such lands to W. B. the obligee, then the obligation to be void.* It was objected that this condition was repugnant and impossible, viz. that if he die without issue, then by his last will or otherwise he would convey &c. and that he cannot convey when he is dead; and of this opinion was Doderidge; but by the other 3 judges, the condition being made in benefit of the obligor [obligee] shall be construed according to the intention of the parties, which was, that J. should make a conveyance in his life by will, or otherwise, of lands so as they should remain to W. and his heirs, in default of heirs of the body of J. Jo. 180. pl. 7. Trin. 4 Car. B. R. Eaton v. Butter.

and that tho' the intent is to be pursued, yet that is when the words lead us to the intent. But the other 3 held e contra, and gave judgment to the plaintiff accordingly.

6. A bond was condition'd to pay 7 l. by 2 s. per week, and if he fail of payment at any of the days, the bond to be void, or otherwise to remain in full force. The defendant pleaded that he did not pay at one of the days. The court held that the condition shall be taken distributively reddendo singula singulis, that if he pays the 7 l. the obligation shall be void, but if he fails to pay the 2 s. a week at any of the days, it shall be in full force; for the obligation shall not be ineffectual if by any means it can be made good. Lev. 77. Mich. 14 Car. 2. B. R. Vernon v. Alsop.

judged after advisement several terms that the obligation was single, and the condition repugnant and void.——S. C. cited 2 Mod. 285. and S. P. adjudged accordingly. Hill. 29 & 30 Car. 2. Wells v. Wright,

Sld. 456.
pl. 27. S. C.
and judgment for the
plaintiff,
N16—
Mod. 35.
pl. 85. Hill.
21 & 22
Car. 2. B. R.
Maleverer
v. Redshaw.
S. C. but
adjournatur.
—Vent.
39. S. C.
but S. P.
does not ap-
pear.

7. The condition of a *sheriff's bond* was, that if the defendant appear &c. such a day in B. R. &c. then the condition to be void; when it should be, then this obligation to be void, for if the defendant had appear'd, yet the condition is still void; and if so, then the bond is single and without a condition, whereas the statute 23 H. 6. 10. expressly require that there shall be a condition, therefore this bond is against the statute; but adjudg'd that *these absurd words* at the end of the condition shall not be regarded any more than if they had been omitted, and the sense shall be taken as if the words had been, then this obligation shall be void; and therefore the addition of *useless and impertinent words* shall not hurt the bond and condition, which were perfect before. 2 Sand, 78. Pasch. 22 Car. 2. Maleverer v. Hawkesby.

2 Kcb. 625. pl. 24. S. C. adjudged for the plaintiff.

8. Debt on a bond was brought against the heir of the obligor, and the declaration was right, as if the bond had been without mistake; the defendant prayedoyer of the bond, and pleaded non est factum, which was found for the plaintiff. Selby, serjeant for defendant, moved in arrest of judgment, because he said it appeared that the heir was not bound; the bond run thus, *noverint universi per presentes me Johannem Nokes tener' & firmit' obligar' Johanni Stiles in cent' libris legal' monet' &c. Solvend' prædict' cent' libras eidem Johanni Nokes, ad quam quidem solution' obligo me hæredes &c.* and so the heirs being bound to that void payment, the bond must be void as to them; but tot. cur. held the contrary, and said, that the *solvend' being to the obligor himself was absurd, and therefore void, and to be rejected, and that the obligation was to be considered without the solvend'*, and then it runs thus, *noverint universi per præsent' me Johannem Nokes tener' & firmit' obligar' Johanni Stiles in cent' lib' ad quam quidem solution' obligo me hæredes &c.* which certainly binds the heir; for the first words, *tener' & firmit' obligar'* in cent' libris, imply a *solvend'*, for if the obligor be not oblig'd to pay, the word (obliged) would signify nothing at all; and it was agreed on both sides, that the first words were sufficient to bind the obligor and his executors, therefore *ad quam quidem solution' &c.* were adjudg'd to refer to the legal *solvend'* implied in the first words, and therefore good, and judgment pro quer'. MS. Rep. Mich. 12 Annæ, C. B.

For more of Conditions repugnant, see Tit. Grant. (R. 14), (H. a. 10), Tit. Obligation (M) pl. 5. (R), &c. Tit. Reservation (B. 2) and (T) per totum, and other proper titles.

(C. a) What shall be said a Condition impossible.

Br. Conditions, pl. 119. [1. If a woman makes a *seffment* to a man that is married to another, upon condition that he shall marry her, this is a good condition; for the wife may die, then he may marry her. 40 Aff. 13. adjudged by admittance; but quære.]
cites S. C.
—Fitzh.
pl. 17. cites
S. C.—Br. Condition, pl. 202. cites S. C. & F. N. B. 205.—F. N. B. 205. (H) cites S. C.

[2. If

Condition.

III

[2. If the condition of an obligation be that the obligor *shall assign to the obligee a commission of bankruptcy*, this is an impossible condition, and therefore void, and the obligation single; for it is impossible to assign the commission. Mich. 14. Car. B. R. between Street and Daniel; adjudged per Cur. upon a demurrer.]

(D. a) What shall be said a Condition impossible and void, and what not. Fol. 420.

[1. IF the condition be *quod debet pluerē cras*; this is a good condition; for tho' the obligor is not certain thereof, yet if he will take this upon himself, and run the hazard thereof, he may at his peril, for this is not impossible of itself. 22 E. 4. 26.]

[2. So for the same reason, if the condition be, *that the pope shall be at Westminster to-morrow*; this is a good condition. 22 E. 4. 26.]

[3. If the condition be, *that the obligor shall go from the church of St. Peter's in Westminster to the church of St. Peter's in Rome within 3 hours*, this is impossible and void. Co. Litt. 206. b.] See (E. a) pl. 3. and the note.

[4. If by the condition a *thing is to be done within a franchise*, this is a good condition, for it may be tried here. Contra 10 H. 6. 14 B. Curia.] As in Wales, County Palatine or Cinque Ports where the

king's writ does not run, the condition is void, because it cannot be tried, and this is where the obligation is used at the common law. Br. Condition, pl. 196. cites 10 H. 6. 14.—Br. Trial, pl. 144. cites S. C. but Brooke says this is only the saying of the court as to the condition.

[5. [So] If by the condition a thing is *to be done beyond sea*, this is a good condition, for it may be tried here. Contra 21 E. 4. 10. Quere 4 H. 6. 23. 6.] Contra per Brian that the condition is void.

for it is not triable in England, and therefore in effect impossible. Br. Obligation, pl. 70, cites 21 E. 4. 10.—As if it be to pay money, or the like, the deed is single and the condition is void, because it cannot be tried in England; and where a man pleads a plea triable beyond sea it is no plea, and the other may demur. Br. Condition, pl. 170. cites 21 E. 4. per Brian, Ch. J. and ibid. pl. 172. cites 21 E. 4. 36. per Vavisor.—The condition is void, and this is where the obligation is sued at the common law. Br. Condition, pl. 196. cites 10 H. 6. 14.—If a man be bound in an obligation to pay 10 l. to the obligee at Paris beyond sea at a certain day, if the obligor pays at another place and the same day in England, and the other accepts it, this is good clearly; quod nota. Br. Conditions, pl. 206. cites 38 H. 8.—But per Brian, if a man be bound in 20 l. to pay 10 l. at Bourdeaux, the plaintiff may declare upon all the deed; but if the defendant pleads payment at Bourdeaux, extra regnum, the plaintiff shall be barr'd, because it is part of the plaintiff's count. Br. ibid.

[6. If the condition be *to save harmless the obligee against a stranger from an obligation, in which the obligee stood bound to the obligor* this is a good condition; for tho' by no possibility the stranger could have any thing to do with it, yet if he saves him harmless against him, 'tis within the condition, for it may be that he has some fear of damage by him. Contra 21 E. 4. 53. b. but quere.] Br. Conditions, pl. 175. cites 21 E. 4. 54. contra, per Collove Choke & Brian; for the stranger has nothing

do with the debt by obligation which is between the obligor and obligee, and so the condition impossible and void; and then the obligation is single.

• This is misprinted; for it should be as in the Roll (53. b.) [pl. 21.]

7. If

7. If a man pleads defeasance in debt upon an obligation of a thing to be done beyond sea, which cannot be tried here, or in two counties, as in London and Wiltshire, where the one cannot join with the other, so that trial cannot be had, this is void, and the obligation is single. Br. Defeasance, pl. 13. cites 22 E. 4. 2.

(E. a) Condition impossible. The Effect of a Condition impossible at the making thereof.

Br. Conditions, pl. 155. cites S. C. And in such case the estate is absolute; as if the condition be to go to Rome from Westminster in 3 hours. Co. Litt. 206. b. — S. P. per Markham. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. — S. P. But if the condition be to do any thing against law, as to kill a man, and the like, there the one and the other are void. But if the condition be possible at the time of the making, as to infeoff J. S. and this becomes impossible after by the act of God, or of J. S. or if J. S. dies or enters into religion by the day, there the obligation is saved by the condition. Br. Obligation, pl. 45. cites 2 E. 4. 2.

[1.] If the condition of an obligation of feoffment be impossible at the making thereof, this is a void condition; but the obligation or feoffment is not void, but single. 14 E. 4. 3. Co. Litt. 206. because the condition is subsequent.]

If a condition precedent be impossible, the estate, interest, or agreement, cannot arise; but a condition subsequent is of another consideration; per Holt Ch. J. in delivering the opinion of the court. 2 Ld. Raym. Rep. 766. Pasch. 1 Ann. in case of Feltham v. Cudworth.

[2. But if the condition precedent be impossible at the making thereof, there all is void, because nothing passes before the condition is performed. Co. Litt. 20. b. [206. a.]

[3. As if a man leases for life upon condition, that if he goes from the church of St. Peter's in Westminster, to the church of St. Peter's in Rome, within three hours, to have a fee, which is impossible, yet because it is precedent no fee can accrue. Co. Litt. 206. b.]

4. Where a man is bound to do one thing or another, and the one is possible, and the other impossible, he ought to perform that which is possible. Br. Conditions, pl. 47. cites 21 E. 3. 29.

5. It is agreed that where a man binds himself by covenant to a thing impossible the covenant is void; but if it be to do a thing within the power of man, then e contra. Br. Covenant, pl. 4. cites 40 E. 3. 5.

Fitzh. Obligation, pl. 17. cites Mich. 17 H. 6. S. C. 6. A. is bound to B. in an obligation conditioned to stand to the arbitrement of C. so that it be made before 15 Mich. and that the obligor shall have notice of it 14 days before 15 Mich. to attend the said arbitrement; and the 15 Mich. is 14 days before the date of the said obligation, and so the notice is impossible to be performed, this obligation is good, and the condition void; adjudged in the Exchequer Chamber. Jenk. 116. pl. 31.

7. Obligation with condition impossible is as well void as where the condition is against law; per Markham and Danby Ch. J. Br. conditions, pl. 150. cites 8 E. 4. 12, 13.

8. There is no diversity where the thing or condition is impossible at the commencement, and when it is possible at the commencement, and made impossible after; for an impossible condition shall be said void,

void, and the grant good. And where the condition was possible, and became impossible after, there it is single also; As where an annuity is granted by R. Prior of S. till the plaintiff be promoted by R. this is a condition; but if R. dies before promotion, now the grant is single, for the tender of the successor is not good; Contra if it had been granted by name of Prior without name of baptism. Br. Conditions, pl. 69. cites 14 H. 7. 31. and 15. H. 7. 1.

9. Where a deed has covenants, *partly possible, and partly impossible*, it is good for the possible ones, and void for the other. Br. Faits, pl. 37. cites 14 H. 8. 25. per Pollard.

[113]
But in the
case of a
joint cove-
nant all is
void; per
Brudenell. Ibid.

10. A bond was conditioned for *sustaining and maintaining an house, &c. in sufficient repairs*, and so to leave it at the end of the term; at the time of the entry into the bond, the timber of part thereof was so rotten, that it was impossible to sustain and maintain it in repairs, yet the obligation is good, though the condition was impossible; adjudg'd. Sav. 96. pl. 177. Trin. 31 Eliz. Wood v. Avery.

time of the demise, that he could not maintain or repair it, and therefore he took it down, and rebuilt it again, in so short a time as he could possibly, in the same place, so large, and so sufficient in breadth, length, and height, as the other kitchen was; and that the said kitchen, all times after the re-edifying of it, he had sustained and maintained, and well repaired, and demanded judgment, &c. Upon which plea the plaintiff did demur in law; and by the court, the plea were a good plea if it were in an action of waste, but here, where he has by his own act tied himself to an inconvenience, he ought at his peril to provide for it; and here it was said, that if the condition be impossible the bond is single; contrary where a man is charged by an act in law.

11. A condition *altogether impossible* is void. Cro. E. 780. As, if I am bound to in-
pl. 14. Mich. 42 & 43 Eliz. B. R. in case of Wigly v. Black-
wall.
that comes first to Paul's on Michaelmas day next it is void, because it is impossible. Per Popham,
Goldsb. 188. pl. 132. Hill. 43 Eliz.

12. Condition to pay money at a day past makes the obligation single. Brownl. 104. Mich. 6 Jac. Green v. Eaden.

13. In debt upon bond, condition'd to pay the money on the 31st day of September, whereas there are not so many days in the month; the defendant pleaded solvit ad diem, and found for the plaintiff; it was moved in arrest of judgment, that the condition was impos-
sible; sed per Curiam, the condition being impossible, the money is
due presently. Jo. 140. pl. 6. Trin. 2 Car. B. R. Jiggon v. Pur-
chase.

payable presently, and judgment for the plaintiff.——Cro. C. 78. pl. 9. Trin. 3 Car. in Cam-
bridge. Purchase v. Jegon, S. C. and judgment affirmed.——Hut. 175. Trin. 7 Car. S. P. in case
of Goffee v. Brown.

14. If a man is bound to do a collateral act, and that matter be-
comes impossible afterwards, it is void; but not to where the con-
dition is parcel of the duty contained in the obligation. Arg. 2
show. 143. pl. 119. Mich. 32 Car. 2.

Palm. 516.
Wood v.
Bates, S. P.

The report
adds (per-
haps) at the
end.

15. A bond to the sheriff to appear at a day certain, where there is no such day, is a condition impossible at the time of making the bond, and therefore the obligation is single; and judgment for the plaintiff. But note, the defendant did not plead the statute 23 H. 6. for had he pleaded obligation without condition or consideration impossible, which is all one, it had been void by the statute. 3 Lev. 74, 75. Mich. 34 Car. 2. C. B. *Graham v. Crawshaw*.

16. If one binds himself in a bond to go to a place not in being, or to do other impossible thing, the obligation is single; and here the case was, one laid a wager that he would walk in such a time to High-Park Corner, and the place being Hyde-Park Corner, and no such place as High-Park Corner, he lost his wager. Per Cur. 12 Mod. 418. Mich. 12 W. 3. *Wall v. Grovet*.

17. *Sci. Fa.* against the bail, reciting a recognizance taken in the reign of the late king William, wherein the condition was, that the defendant should render himself to the prison of the Marshalsea Dominæ

[114] *Reginæ nunc.* It was argued that the condition is impossible, and consequently the recognizance single. Per Holt Ch. J. where the condition is under-written or indorsed, there that is only void, and the obligation single; but where the condition is part of the lien itself, and incorporated with it, there, if the condition is impossible, the obligation is void; and the court inclining that it was ill, the plaintiff for his own expedition, pray'd that his writ might be abated. 1 Salk. 172. pl. 4. Trin. 2 Ann. B. R. *Pullerton v. Agnew*.

(F. a) What Persons may perform it.

(T) pl. 12. [1.] F. A. and B. levy a fine to the use of A. in fee, if B. does not
S. C. but pay 10s. at Michaelmas after, and that if he doth then pay
not S. P. the 10s. that then it shall be to the use of A. per life, and after to B.
(D. d) pl. 1. in fee, and after B. dies before Michaelmas; it seems the heir of B.
S. C. but may pay the 10s. for this is not more personal, being the payment
that is upon the point of not ceasing to the
heir.—Jo. B. R. between *Spring* and Sir *Julius Caesar*, Master of the Rolls,
259. pl. 10. in a writ of error upon a judgment in a quare impedit. The court
S. C. ac- divided on this point, scilicet, *Croke* and *Jones* inclined that it was
cordingly. not personal, but the heir might perform it; but *Brampston* &
—Win. Berkely e contra.]
101. to 110.
and 115.

to near the end of fol. 120. Mich. & Hill. 22. Jac. *Cowper v. Edgar*, S. C. argued by the serjeants, but no judgment.—Payment of a small trifling sum may be considered rather as a ceremony than a valuable consideration, per *Parker C.* and he said, that he took this to be the ground upon which the 2 judges went, who in the case of *Spring v. Caesar* held the payment of 10l. to be a personal act; for when the sum comes to be considerable, as 500l. &c. the payment of it is never esteemed a personal act. 10 Mod. 424. in case of *Marks v. Marks*.—And he said, that this appears throughout 7 Rep. in *Englefield's* case.—Chan. Prec. 486. S. C. but S. P. does not appear.

2. Feoffment in fee upon condition to be void if the feoffor pays so much to the feoffee, and the feoffee dies before payment, his heirs cannot pay it, because the time of payment is past; for the condition being general, if the feoffor pays, &c. it is as much as to say, If the feoffor during his life pays, &c. Litt. S. 337.

3. But

3. But when a day of payment is limited, and the feoffor dies before the day, his heir may tender the money, because the time of payment was not past by the death of the feoffor. Litt. S. 337.

4. And it seems, that so may his executors, because they represent the person of their testator. Litt. S. 337.

And so may his administrators, and

if there be neither executor nor administrator, the ordinary may do the same. Co. Litt. 209. a.

5. If a man mortgages his land to W. upon condition that if the mortgagor & J. S. pay 20 shillings at such a day to the mortgagee, that then he shall re-enter. The mortgagor dies before the day. J. S. pays the money to the mortgagee. This is a good performance of the condition, and yet the letter of the condition is not performed. But if the mortgagor had been alive at the day, and he would not pay the money, but refused to pay the same, and J. S. alone had tendered the money, the mortgagee might have refused it. Co. Litt. 219. b.

6. But in the former case, albeit the mortgagor be dead, yet the act of God shall not disable J. S. to pay the money, for thereby the mortgagee receives no prejudice; and so it is in that case, if J. S. had died before the day, the mortgagor might have paid it. Co. Litt. 219. b. [115]

7. If A. infeoffs D. his second son upon condition, that if he pay 500 l. to D. then E. his 3d son should have fee. This is a condition, the right of performing which, descends to the heir of A. and he may take advantage of it; for the limitation of the fee over to E. is void by a particular maxim of the common law, which will not allow a fee to be limited upon a fee, or by that other maxim by which a stranger cannot take advantage of a condition; per Parker C. 10 Mod. 423. Mich. 5 Geo. in Canc. in case of Marks v. Marks.

8. If a lease is made to 2, with condition to have fee, and the one dies, the survivor may perform the condition and have the fee; but if the same jointenants have made partition the condition is destroyed, because the estate in fee ought to increase to them jointly and not in severalty; per Coke Ch. J. 8 Rep. 75. b. 76. a. Trin. 7 Jac. in lord Stafford's case.

a Bro vnl. 251. S. 1^a. per Coke Ch. J. says it is agreed by 12 Affs. because the privity remains, and the estate also in substance.

9. Devise of lands to his daughter and her heirs, at her age of 18, and that his wife shall take the profits in the mean time, provided she keeps the daughter at school, &c. The widow marries again and dies, the daughter not being 18. Adjudg'd that this was a plain term given to the wife for her own use, which accrues to the husband, and the keeping and educating the daughter is not of such a particular privity but that it may be performed effectually by another. Hob. 285. pl. 370. Trin. 17 Jac. Balder v. Blackburne.

Hutt. 36. Blackburne's case, S. C. accordingly, and that here was no default in the wife, for it is the act of God, and therefore judgment

for the plaintiff.——Brownl. 79. S. C. adjudged for the plaintiff.

10. Devise of lands to his wife for life, and after her death to D. his 3d son and his heirs, provided, that if C. the second son do

The title thereby that if C.

shall pay, and not C. and his heirs, yet this is only a plain mistake in the will, within 3 months after my wife's death pay to D. his executors, &c. 500 l. then the lands to come to C. and his heirs. C. died, living the wife. The heir of C. may pay the money, and shall have the estate conveyed to him. Pasch. 1718. Ch. Prec. 486. Markes v. Markes.

which is a conveyance that the law supposes to be made when a man is *inop: cunctillii*, and therefore favoured greatly; per Parker C. 10 Mod. 422. S. C.

Fol. 421.

(G. a) To whom it may be performed.

Cro. E. 383. [1. IF a man makes a *feoffment* in fee upon condition that if he pl. 4. S. C. pays 100 l. to the heirs, executors, or administrators of the & S. P. admitted, but the payment him to re-enter, and after the *feoffee* makes a *feoffment* to J. S. and to the heir dies, and the feoffor pays the money to the heir of the feoffee, this being coven- is a good performance of the condition; for the heir is within the- ous, was no is a good performance of the condition. Mich. 37, 38 Eliz. B. R. between perform- exprefs words of the condition. Goodale and Wiat resolv'd Co. 5. 96. Same case.]

Mo. 708. [2. And in this case if the money had been paid to the assignee, it pl. 989. S. C. & S. P. ad- had been no performance of the condition, because the assignee is mitted.—not named. Co. 5. Goodale 97.]

Gouldsb. 176. pl. 111. S. C. Fenner thought that no payment ought to be made to the heir*; but Gawdy and Ciench e contra.—Poph. 95, 100. S. C. all agreed that notwithstanding the *feoffment* made over by the father, the money might have been paid to the heir to perform the condition, if it had been truly paid and without covin; but by Popham and Clench, if a *feoffment* to be made to one, upon condition of payment of money to the feoffee, his heirs or assigns, and the feoffee makes a *feoffment* over, and dies, the money ought to be paid to the feoffee, who is the assignee, and not to the heir, for there (heir) is not named but in respect of the inheritance which might be in him, but here he is named as a mere stranger to it.

A. gives to B. solvend' to such person as he shall appoint; if B. appoints one, payment to him is payment to B; but if B. appoint none, it shall be paid to him. 6 Mod. 228.

Where the feoffor has any reversion remaining in him, the payment must be to himself; but where he departs with his intire fee, as *feoffment* in fee, gift in tail, or lease for life, remainder over in fee there, lessee for life, or donee in tail, is assignee. 5 Rep. 97. a. Goodale's case.

*[116]

3. *Feoffment* on condition to pay to the feoffee, his executors, or assigns, within three years, and then feoffor his heirs, &c. to re-enter. The feoffee has 2 sons, *infants*, whom he makes executors, and dies before the day. J. S. is made *administrator during minority*; 'tis most sure for A. to pay the money to the executors, for the administrator during minority is but as bailiff or receiver to the executors, and payment to one of them is good. 3 Le. 103. pl. 151. Pasch. 26 Eliz. C. B. Anon.

4. If a man makes a *feoffment* in fee, by way of *mortgage*, upon condition to be void upon payment of the money by the feoffor at a day, if the *feoffee* dies before the day, the money shall be paid to the executors, and not to the heirs of the feoffee; because it shall be intended the estate was made by reason of the loan of the money, or some other duty. Litt. S. 339.

S. P. for in this case de iustis per- 5. But if the condition be, that if the feoffor pays, &c. to the feoffee, or his heirs, if he dies before the day the payment ought to be made to his heir, and not to his executors. Litt. S. 339.

sons

form est exclusio alterius, & expressum facit cessare tacitum. And the law shall never seek out a person, when the parties themselves have appointed one. Co. Litt. 210. a.

6. Condition of an obligation entred into by M. was to pay 10 l. Litt. Rep. per ann. after his death to the executors of the obligee, for the use of ^{156. Man-} *M's children*. The obligee dies without making any executor. ^{ington's} *case*. S. C. The court seem'd of opinion that the money shall be paid to his ad- in totidem ministrators. Sed Adjournatur. Het. 115, 116. Trin. 4 Car. C. B. ^{verbia} Manningham's case.

(H. a) [To whom to be performed.] Assigns.
[Executors.]

[1.] If the condition be to lease certain lands for three lives to the Roll. Rep. obligee or his assigns, and after the obligee demands a lease to 37. pl. 28. be made to 3 strangers for their 3 lives, he ought to make it to S. C. & S. P. them accordingly, or otherwise the condition is broke, for here by per Curiam the word assigns is intended assigns by nomination; for he cannot have accordingly. 168. S. C. & other assigns, in as much as the estate is not assignable before he S. P. by Coke hath it. Pasch. 14 Jac. B. between *Albon and Wedgwood*, per Ch. J. accordingly; Curiam.] but said it had been

otherwise clearly, if it had been to be made to him, (and) to his assigns; but that here he has an election to whom he will make this lease; as if you are to make a lease to me or to three which I shall name.—Bridg. 39, 40. S. C. & S. P. Arg. but nothing said to it by the court.

[2. If a man be bound in 20 l. upon condition to pay 10 l. to such ^[117] persons as the obligee shall name by his last will, and after the obligee Hob. 9. pl. 19. S. C. per names no person by his will, the obligor is not bound to pay it to his Curiam executors, because the condition hath reference to his nomination. though clearly; for Mich. 10 Jac. B. per Curiam, & Tr. 12 Jac. B. between *Pease & Mead*, per Curiam.] where any thing testamentary is covenanted

to be done unto a man or his assigns, that is to be done to the executors where there is no actual assignee, as in *Chapman and Dalton's case*, and in † 27 H. 8. for the delivering of rentals to a man and his assigns; the reason is because the word (assignee) is indifferent both to the assignee in deed and in law; And there when the executor takes it he has it to the use of the testator; But here the words must needs be understood of an assignee in deed, who shall take it to his own use, for the word (paying) carries property with it.—Mo. 855. pl. 1172. S. C. adjudged, that the executor is not assignee; for there ought to be an express assignee, and therefore the condition becomes impossible by the omission in not naming the obligee, and so the obligation discharged.—Godb. 192. pl. 274. Mead's case, S. C. held accordingly per tot. Cur. and Coke took a diversity, that if I am bound to pay 10 l. to the assignee of the obligee, and his * assignee makes an executor and dies, the executor shall not have the 10 l. But if I am bound to pay 10 l. to the obligee or his assignees, there the executor shall have it; because it was a duty in the obligee himself; and judgment accordingly.

† Pl. C. 288. a cites S. C.

* [It seems the words (his assignee) are misprinted and should be only (he)] —See Tit. Executor (X) pl. 2. *Pease v. Stileman*, S. C.

3. If A. infeoff B. to infeoff C. and D. and D. dies; yet B. ought to infeoff C. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. So if D. refuses and C. not. Ibid.

4. Note per Fortescue, Ascough, Newton and Paston, that if a man infeoffs another upon condition to infeoff the baron and feme in tail, the remainder to W. in fee, and he offers to the baron and feme, and they refuse, he has not performed the condition, unless he offers

offers to him in remainder. Br. Conditions, pl. 211. cites 19 H. 6. 76.

S. C. cited

5 Rep. 96. b.

97. a. as re-

solved,

Mich. 23

& 24 Eliz.

In the court

of wards.—

Mo. 243.

pl. 382.

Mich. 29

Eliz. cites

the case of

Randal v.

Barker in

the Court of

Wards 14

Eliz. in

which case Barker

covenanted, that if

Randal pay 400 l. to him or his assigns before such a day, he

would stand seised to his use in fee; and before the day he inclosed one W. of the land, and at the

day the money was tender'd to W. and adjudged, that it was due to W. he being assignee of the land,

and not to B. who was the covenantor; where Coke, who cited the case, said, that such payments,

tho' they are collateral, yet with words of assigns they shall go to the assignee and not to the co-

venantor.

5. R. being seised of certain lands, covenanted with B. that if *he pay unto him, his heirs and assigns, 500 l. then he and his heirs would stand seised to the use of the said B. and his heirs; R. devised the land to his wife during the minority of his son, the remainder to his son in fee, and died, having made his wife executrix.* B. at the day and place tendred the money generally, *the wife having but an estate for years in the land took the money.* It was holden, that the same was not a sufficient tender, for the wife is not assignee, for she has only an interest for years, and here the son is to bear the loss; for by a lawful tender the inheritance shall be divested out of him, and therefore the tender ought to be made to the son and not to the wife. Le. 252. pl. 339. Trin. 33 Eliz. B. R. cites it as the case of Randal v. Brown.

6. *So if R. had made estate for life or years, &c. for no one shall be assignee in this case; but when the covenantor departs with his whole estate, as if he makes a feoffment in fee, gift in tail, or lease for life, with the remainder over in fee, in such case the lessee for life, or donee in tail, is the assignee; but so long as the covenantor has reversion remaining in him, the payment ought to be made to him.* Resolved by the whole Court of Wards, cited 5 Rep. 97. a. as Randal's case.

7. *So it was said, if R. had made assignment of his entire estate in part, that so long as any part remained with R. the tender ought to be made to him or his heirs.* Ibid.

* [118] 8. Land was mortgaged, and a promise [proviso] that *if the mortgagor at such a time and place should pay the money to the mortgagee, his * heirs, or assigns, the mortgage should be void.* The mortgagee died, and the money was paid to his executor; and it was adjudged to be no performance of the condition; for the executor was not named, and the money ought to be paid to the heir who should have the land, if the money were unpaid, and not the executor. Brownl. 64. Mich. 6 Jac. Alston v. Walker.

9. Condition was *to make the obligee a lease for life by such a day, or pay him 100 l. Obligee died before the day; and adjudged, that his executor shall have the 100 l. per Treby Ch. J. and the ground of Laughter's case was denied to be universal.* 1 Salk. 170. pl. 2. Mich. 9 W. 3. C. B. Anon.

(I. a) What persons shall be bound by a Condition.

* Br. Baron [1.] *If an estate be made to a feme covert, she shall be bound by the condition, because this does not charge her person, but the land.* * 45 E. 3. 12. D. 28 H. 8. 13. + 6. 5.]

[b. 22]

[3. 12. a. pl. 7.] S. C. as to payment of the rent reserved on a lease for years to her and her baron, but contrary of other collateral covenants.

† This is misprinted, and should be pl. 65.—It was agreed, that if lands are given to a feme sole upon condition, and the taker baron, who breaks the condition, the feme shall be bound. Mo. 92. pl. 229. Trin. 9 Elis.

[2. If an estate be made to an *infant* upon an express condition, And if the condition be broke during his minority, the land is lost for ever; resoly'd. 3 Rep. 44. b. Hill. 45 Elis. In Whittingham's case. S. C. cited Arg. Hard. 11.

[3. So if an estate be made to another *in fee upon condition*, his Cro. J. 374. heir, after his death, though he be *within age*, shall be bound by pl. 5. S. C. the condition. Tr. 13 Jac. B. R. between *Slade and Thompson*, ad- & S. P. seems to be admitted. Roll. Rep. judged and agreed.]

136. pl. 18. S. C. & S. P. admitted. — Ibid. 198. pl. 2. S. C. & S. P. admitted by judgment. 3 Bulst. 58. S. C. & S. P. admitted.

In assise it was found, that A. *infeoffed* B. in fee upon condition, *that if A. or his heirs pay C. 100l. at such a day, that they may re-enter.* A. died, his heir *withbin age*. The day *incurr'd during the non-age*, and the heir did not tender at the day; and after they came to the *feoffees*, who at their request deferred the day of payment, at which day he refused, [to accept the money then tendered] and the heir entered, and because the heir was within age at the day of payment, and that the feoffee deferred the day of payment, therefore the entry lawful by award; but Brooke says, quod nota, for mirum! for it seems to be contra legem. Br. Conditions, pl. 114. cites 31 Aff. 17. — S. C. cited 3 Bulst. 59. Arg.

4. If an office of *parkership* be granted or descends to an *infant* or *feme court*, if the conditions in law annexed to this office, which require skill and confidence be not observed and fulfilled, the office is lost for ever, because as Littleton says, it is as strong as an express condition; but if a lease for life be made to a *feme covert*, or an *infant*, and they by charter of feoffment alien in fee, the breach of this condition in law, that is without skill, &c. is no absolute forfeiture of their estate. So of a condition in law given by statute, which gives an entry only; as if an *infant* or *feme covert* with her husband *aliens* by charter of feoffment in mortmain, this is no bar to the infant, or feme covert. But if a recovery be had against an infant or feme covert in an action of waste, they are bound and barr'd for ever. Co. Litt. 233. b.

5. Whether the king shall be bound by a condition see a long argument. Hardr. 10 Mich. 1655. in the Exchequer, Newman v. Phillips. [119]

(I. a. 2) Who bound. By Agreement to the Estate.

1. *THREE* infeoffed by deed, and there were several covenants Br. Ef- in the deed on the part of the feoffees, two only sealed the tranger al Fait, pl. 23. deed, yet because the 3d entered and agreed to the estate conveyed cites 50 E. by the deed, he was bound in writ of covenant by the sealing of his 3. 22—3 companions. Arg. 2 Roll. R. 63. cites 38 E. 3. 8. Bulst. 163. S. P.

2. Lease to A for his life, the remainder in fee to B. upon condition &c. and if A. seals the indenture, and dies, and B. enters into the land by force of his remainder, he is tied to perform all the Br. Ef- tranger al Fait. pl. 23. conditions, cites 50 E. 3.

23. and this conditions, as the tenant for life ought to have done in his life-time, and yet he in the remainder never sealed any part of the indenture; in as much as he entred and agreed to have the lands by force of the indenture, he is bound to perform the conditions within the same, if he will have the land. Litt. S. 374.
 Sect. of Litt. and cites also 38 E. 3. 8. that if a man makes a feoffment by deed-poll upon condition, and feoffee pleads the deed and shews it the feoffor, upon this shewing shall take advantage of the condition, and plead it; so if the feoffor can get the deed, without its being pleaded by the feoffee, the feoffor may plead it, and yet it belongs to the feoffee.—3 Bulst. 263. S. P. Arg. cites Litt. & 59 [50] E. 3. 22.

3. If A. by deed indented between him and B. lets lands to B. for life, the remainder to C. in fee, reserving a rent; tenant for life dies, he in the remainder enters into the lands, he shall be bound to pay the rent. Co. Litt. 231. a.

4. An indenture of lease is ingrossed between A. of the one part, and D. and R. of the other part, which purports a demise for years by A. to D. and R.—A. seals and delivers the indenture to D. and D. seals the counterpart to A. but R. did not seal and deliver it; and by the same indenture it was mentioned that D. and R. did grant to be bound to the plaintiff in 20l. in case that certain conditions comprized in the indenture were not performed; and for this 20l. A. brought an action against D. only, and shewed the indenture; the defendant pleaded that 'tis proved by the indenture, that the demise was made to D. and R. which R. is in full life, and not named in the writ; judgment of the writ; the plaintiff reply'd, that R. did never seal &c. and so his writ good against D. sole. The plaintiff's counsel took a diversity between a rent reserved, which is parcel of the lease, and the land charged therewith, and a sum in gross, as here the 20l. is; for as to the rent they agreed that by the agreement of R. to the lease, he was bound to pay it, but for the 20l. that is a sum in gross, and collateral to the lease, and not annexed to the land, and grows due only by the deed, and therefore R. said he was not chargeable therewith, for that he had not sealed and deliver'd the deed, but in as much as he agreed to the lease, which was made by indenture, he was chargeable by the indenture for the same sum in gross, and for that R. was not named in the writ, it was adjudged that the writ did abate. Co. Litt. 231. a.

[120]

(K. 2) Who may perform it:

[1. IF 2 are infeoff'd to re-infeoff, if one refuses to re-infeoff, the other cannot perform the condition by a feoffment of the whole. Contra 49 E. 3. 16. b.]

[2. If the condition of an obligation be to pay a less sum; if my servant by my command, tenders it to the obligee, this is sufficient. 2 H. 6. 3. b.]

3. Debt upon obligation with condition that if the feoffees of J. C. or J. C. by such a day grant 40 s. per ann. to the obligee, that the obligation shall be void, and said that A. and B. his feoffees granted

granted &c. The plaintiff said that A. B. and C. were his feoffees, and C. did not grant. And by all the justices the condition is not performed; for there is no diversity between these words, *his feoffees*, and *all his feoffees*; quod nota. Br. conditions, pl. 56. cites 21 H. 6. 10.

4. If annuity be granted by J. abbot of D. till the grantee be promoted to a competent benefice by the same abbot, tender of the benefice by his successor, is not good. Contra if it had been by (the) abbot of D. and (J.) had been omitted. Br. conditions, pl. 214. cites 15 H. 7. 1.

5. If I covenant that my eldest son shall marry your daughter by such a day, and he dies before the day, the 2d son who now is eldest cannot perform the condition. Per Audley Chancellor. Br. conditions, pl. 7. cites 27 H. 8. 14, 15.

6. If a man infeoffs 2 upon condition that they infeoff W. N. before Michaelmas, and one dies, and the other alone makes the feoffment, this is good. Br. jointenants, pl. 62. cites Pasch. 33 H. 8.

7. M. seised in fee made a feoffment upon condition, that if he or his heirs pay 100 l. such a day to re-enter; M. died, his son and heir within age; the mother of the infant, without the privity of the infant, and who was not guardian in socage, in the name of the infant, tender'd the money at the day; it was adjudged an insufficient tender; otherwise if the jury had found the infant under 14, and that she had been his guardian in socage, or if he had been found upwards of 14, and that he assented to the tender, it would be sufficient. Mo. 222. pl. 361. Hill. 28 Eliz. Watkins v. Ashwell, Le. 34. pl. 43. S. C. resolved per tot. Cur. accordingly, because the jury found him at the time of the tender within age generally, and not particularly of 6 or

10 years, &c. — Ow. 137. S. C. & S. P. agreed accordingly. — Cro. E. 132. pl. 7. is a short note of S. C. — 2 Le. 213. in pl. 268. S. C. cited. — Win. 118. cites S. C. that if an heir is bound to perform a condition, then a stranger may not perform it, but any who had an interest may, as guardian in socage or chivalry, &c. — Co. Litt. 206. b. S. 1. — If a stranger of his own head, who has not any interest, &c. will tender the money to the feoffee at the day appointed, the feoffee is not bound to receive it. Litt. S. 334. — But if the mortgagee accepts it of the stranger, this is a good satisfaction, and the mortgagor or his heir agreeing thereto, may re-enter into the land; but the mortgagor may disagree thereunto if he will. Co. Litt. 206. b. 207. a.

8. A stranger cannot tender the money to be paid on a mortgage; 2 Le. 213. for it ought to be one who has interest in the land. Ow. 34. Trin. 31 Eliz. Winter v. Loveday. S. C. held accordingly.

In this case the mortgagee covenanted that W. upon re-payment of the money at Michaelmas, in such a church-porch, should have back all his evidences. At the day of payment C. a stranger sent to L. to know if he would receive the money which W. ow'd him, at his house, who consented; whereupon C. came there, and the money was told and deliver'd in bags to L. but some dispute arising between W. and L. about some writings, C. said that if they would not agree betwixt themselves, they should not have his money; whereupon W. requested C. that he might have the money to carry to his said church-porch, which C. agreed to, and L. came thither to receive it, but W. would not pay it; by all which it appeared that it was not W's money, and for that reason the court held that it was not a sufficient tender.

9. If a man mortgage land to W. upon condition that if the mortgagor and J. S. pay 20 s. at such a day to the mortgagee, that then he shall re-enter. The mortgagor dies before the day. J. S. pays the money to the mortgagee; this is a good performance of the condition, and yet the letter of the condition is not performed. [121] But if the mortgagor had been alive at the day of payment, and he would

not pay the money, but refused to pay the same; and J. S. alone had tendered the money, the mortgagee might have refused it; So that tho' the mortgagor be dead, yet the act of God shall not disable J. S. to pay the money, for thereby the mortgagee receives no prejudice. Co Litt. 219. b.

10. If the heir is an idiot, of what age soever, any man may make the tender for him in respect of his absolute disability, and the law in this case is grounded upon charity, and so in the like cases. Co. Litt. 206. b.

5 Rep. 96. 8 P. accordingly, and cites S. C. & notes a diversity that the money shall not be paid to the assignee of the land without naming him in the condition, because the payment goes in defeasance of the inheritance; but it may be paid by the assignee in preservation of his inheritance. S. C. cited 4 Le. 176. by Manwood Ch. B. S. C. cited by Manwood Ch. B. Mo. 336. in pl. 415. And if the feoffee die his executors shall pay the money or his heir; so payment limited by the feoffor, at a day certain, his heirs or executors shall pay. S. C. cited by Jones J. Lat. 28.

12. Devise to A. and his heirs for ever, on condition that A. pay B. 100 l. within 6 months after his age of 21 years, and for default of payment he gives the said lands to B. and her heirs, and if A. happen to die without issue, B.'s 100 l. being first paid, then the remainder of his estate to be divided among my sons and daughters; A. dies without issue before 21 years, it seems the brothers and sisters paying the 100 l. before the time that A. would have been 21 had he lived, was a good performance. Raym. 425. Hill. 32 & 33 Car. 2 B. R. Wilson v. Dyson.

(L. a) To whom it may be performed.

Debt upon bond, conditioned to deliver 40 pair of shoes [1.] F the condition of an obligation be to pay 10 l. &c. it is a good performance if he pays it to his deputy. 42 E. 3. 13. b.]

within a month, at Holborn-bridge, to H. K. a common carrier, for the use of the obligee, the defendant pleaded, that in all that space of a month H. K. did not come to London, but that on such a day, at Holborn-bridge, he deliver'd 40 pair of shoes to A. G. the carriers porter; the court (absente North Ch. J.) held the plea good, and that such construction was to be made as was agreeable to the intent of the parties, and that the delivery to the servant was a delivery to the master. 3 Med. 309. Trin. 30 Car. 2. G. B. Staples v. Alden.

2. Debt upon obligation with defeasance by indenture, that if C. at the costs of the plaintiff recovered 2 acres of land against J. and after enfeoffed the plaintiff, that then &c. and he said, that C. by commandment of the plaintiff enfeoffed W. and held a good plea, quod m. rum! because contra T. * 12 H. 4. 23. of things debtors it shall be performed strictly; but payment to the plaintiff, and payment to a stranger is all one. Br. conditions, pl. 24. cites 42 E. 3. 23.

3. If

3. If I infeoff J. S. upon condition, that he shall infeoff such as I shall name before Easter, and I name W. and after I name N. the feoffee may infeoff which he pleases; per Littleton. Br. conditions, pl. 154. cites 14 E. 4. 2.

4. Debt upon obligation of 20 l. upon condition to pay 10 l. the defendant said, that she paid 5 l. to the plaintiff's bailiff by his command, which came to the use of the plaintiff; this is a double plea, by which he relinquished the coming to the use, and then a good plea. Br. conditions, pl. 181. cites 22 E. 4. 25.

5. A. makes feoffment on condition, that if A. pay certain money to feoffee, before such a day, or to his executors or assigns, that then he may enter. Before the day feoffee makes feoffor his executor, and by the same testament gives all his goods and chattles to his wife, and dies; this was thought no release by 3 justices against 1; and Dyer thought that payment might be made to the wife; Weston thought, that if there should be any payment it should be to the heir who is not assignee. Mo. 58, 59. pl. 166. Pasch. 6 Eliz. Anon.

6. Debt upon obligation, conditioned to pay money to the obligee and others the parishioners of D. at such a feast. Payment to the obligee and 2 other of the parishioners of the parish is good; Dyer and Walshe held that it is not requisite the payment be made to all the parishioners. Mo. 68. pl. 183. Trin. 6 Eliz. Anon.

7. In debt the condition was to pay 100 l. to C. and his wife, and by all the court, if he pleads payment to C. alone, it sufficeth, for payment to him alone sufficeth without naming the wife. Goldsb. 73. pl. 16. (20.) Mich. 29 and 30 Eliz. Mary v. Johnston.

8. A. was bound to B. to the use of C. to deliver a chest to C. who refused to receive it upon the tender at the day; the obligation was saved. Cro. E. 755. per Glanvill, cites it as the case of Carne v. Savery.

9. A. was bound to B. to the use of C. A tender to C. is good. Yelv. 38. Cro. E. 754. pl. 18. Pasch. 42 Eliz. C. B. Hughs v. Phillips.

Pasch. 1 Jac.
S. C. & S. P.
admitted by

judgment, and judgment affirm'd.—Cro. J. 13. pl. 17, Phillips v. Hughs, S. C. and S. P. admitted by judgment, and judgment affirmed in B. R.

10. If I bind myself to pay money to 2 actually, I cannot pay it but to one; because I cannot pay one and the same sum to 2 several persons at one and the same time; per Glin. Ch. J. 2 Sid. 41. Hill. 1657. in case of Abbot v. Bishop.

(L a. 2) Performed. How. And to whom:
Cy-pres. After Death, &c. of any.

1. IN assise the case was, that a man infeoff'd 2 upon condition that they re-infeoff him and his feme in tail, the remainder to the right heirs of the baron. The feme took another baron; the feoffees infeoff'd the second baron and the feme for the life of the feme, the remainder to the right heirs of the first baron, by which, b. cause

[123] the estate was not made to the feme in tail, according to the condition, and also the second baron was infeoffed, which is contrary to the condition, the heir of the first baron enter'd, and the feme ousted him; and he arraigned affise; and by advice of all the justices, it was awarded that the condition was well performed; quod nota; and as to the estate for life, Littleton agrees to it in his Chapter of estates. But Brook says *miror!* that the 2d baron had estate; for this is *contrary to the condition*. Br. Conditions, pl. 33. cites 2 H. 4. 5.

S. P. And the estate shall be to the issues in tail, according to the first limitation of the tail, for
 2. But if the condition had been that *J. S. shall make a gift to R. G. and his feme, and to the heirs of their two bodies begotten, and the one dies without issue, [before any estate made]* he shall make estate to the other for life without impeachment of waste; for he shall make it as near the condition as he can. Br. conditions, pl. 70. cites 15 H. 7. 2.

though he cannot perform the condition according to the words, yet it shall be performed according to the intent. Pl. C. 291. a. cited Trin. 7 Eliz. in the case of Chapman v. Dalton.—S. P. and ought to be as near to the intent of the condition as it may be. Litt. S. 352.—This estate to the wife for life ought to be made without impeachment of waste, and yet if the wife accepts of any estate for life without this clause, without impeachment of waste, it is good, because the estate for life is the substance of the grant, and the privilege to be without impeachment of waste is collateral, and only for the benefit of the wife, and the omission of it only for the benefit of the heir. Co. Litt. 219. b.—The omission of the privilege being without impeachment of waste shall not give the heir of the feoffor, for whose benefit it was omitted, a re-entry which would defeat the estate of the wife. Hawk. Co. Litt. 304.—Also if the wife marries before request made, and then they make request, and the estate is made to the husband and wife, during the life of the wife, this is a good performance of the condition, albeit the estate be made to the husband and wife, where Littleton says it is to be made to the wife, but it is all one in substance, seeing that the limitation is during the life of the wife. Co. Litt. 219. b. 220. a.

3. Here is to be observed a *diversity when the feoffee dies*, for then the condition is broken, *and when the feoffor dies*, for then the estate is to be made as near the condition as it may be. Co. Litt. 219. b.

4. And if the *husband and wife have issue and die* before the gift in tail made to them &c. then the feoffee ought to *make an estate to the issue* and to the heirs of the body of his father and his mother begotten, and for default of such issue &c. the remainder to the right heirs of the husband &c. and the same law is in other like cases; *and if such a feoffee will not make such estate* when he is reasonably required by them which ought to have the estate by force of the condition &c. then may the feoffor or his heirs enter. Litt. S. 353.

The reason why the habendum is to the heirs of the survivor, and not to the heirs of the heir, is because if the habendum were made to the heirs of the heir, then some persons by possibility should be inheritable to the land, which should not have inherited if the estate had been made to the survivor and his heirs, and consequently the condition be broken; for if it were to the heirs of the heir, then the blood of the mother &c. might by possibility inherit, which never shall, if the limitation be to the heirs of the survivor, &c. Co. Litt. 220. b.

5. If a feoffment be made upon condition that the feoffee shall *re-infeoff several men*, and their heirs, and they all *die before any estate made*, then ought the feoffee to *make estate to the heir of him which survives*, to have and to hold to him and to the heirs of the survivor. Litt. S. 354.

(M. a) To

(M. a) *To whom the Condition shall be said to extend to be bound by it,* Fol. 422.

[1.] If a man devises lands to H. his son, and the heirs of his body, the remainder to T. and the heirs male of his body, upon condition that he or they, or any of them shall not alien, discontinue, &c. but nothing this condition shall extend only to restrain T. and the heirs male of his body, and not H. and his heirs, Co. 5. Lord Cheney. 68. [124]

[2. If a man leases lands for years, upon condition that the lessee nor his assigns shall not alien the term to any but to one of his brothers, and after the lessee aliens to one of his brothers; this assignee is not within the condition, but he may alien to whom he pleases. Mich. 12 Jac. B. R. Tr. 14 Jac. B. R. between *Whitchcock and Fox*, per Coke.]

S. C. adjournatur. — Ibid. 389. pl. 1. Trin. 14 Jac. B. R. S. C. and Coke Ch. J. thought that the assignment to one of the brothers pursuant to the condition has discharged all the condition, and the estate is then absolute without any condition. — 2 Bull. 296. Fox v. Whitchcocks. S. C. & S. P. per Coke Ch. J. and judgment for the plaintiff accordingly.

3. Conditional devise in fee by baron to his wife, who takes other baron, and the second baron breaks the condition, yet it is no forfeiture. See Mo. 92. pl. 229. Trin. 10 Eliz. Anon.

4. A. devises land to his mother for life, and after her death to B. his brother in fee, proviso that if his wife (being enfeint). be delivered of a son, that then it shall remain to such son in fee, and dies. A son is born; and it was held that this proviso does not destroy the mother's estate, but the estate of B. only. D. 127. pl. 53. Marg. cites 23 Eliz. C. B.

5. Lands were leased on condition, that lessee, his executor or assigns should not alien without leave of the lessor. If execution of such lease be made by reason of judgment, or recognizance, one justice held, he that has it may assign it over; but, per another justice, the execution itself is a forfeiture, which the reporter thinks hard. And. 124. Trin. 25 Eliz. in the case of *Moor v. Ferrand*.

6. A lease for years is made upon condition, that lessee, his executors or assigns, shall not alien without assent of the lessor. The lessee dies intestate; the ordinary grants administration to J. S. who assigns the term without licence; adjudged, that the condition is broken, for he is an assignee in law. Cro. E. 26. pl. 4. Pasch. 26 Eliz. C. B. More's case.

within the penalty of the condition, because he is not in merely by the party, but by the ordinary. — And. 123. pl. 172. S. C. 3 of the judges held, that the administrator was assignee, and so the condition broke within the words and the intent; but the other judge held e contra. — Dal. 83. pl. 29. 14 Eliz. S. P. and it seemed that the condition was not broken, because an administrator is not assignee, but servant to the ordinary, but comes in en le post. Dyer said, that he is assignee in law, but not in fact; and he thought the words would extend to an assignee in law, because they shall be taken strictly, and so he apprehended that the condition was broken. — Lessee covenanted not to lop, or top any trees, and afterwards died intestate; his administrator lopped the trees. The court held, that this was a breach of the covenant, for he is assignee as well as executor; and though at common law he was not, yet now by the statute he is made to all purposes as executor; And Weston said, that administrator in this case is charged in this case as well as an executor would be, because they have the term

term to the use of the testator [or intestate]. Mo. 44, 45. pl. 136. Mich. 5 Eliz. Anon.——Dal. 46, 47. pl. 4. S. C. in totidem verbis.

2 Le. 38. 7. A. devised part of his land to B. his eldest son in tail, and another part to C. his youngest son in tail, provided that if any of his children alien or demise any of the lands to them devised before they come to the age of 30 years, then the other shall enter. A. died. B. demised his part before his age of 30 years, and C. entered, and afterwards demised the same for years before his age of 30 years, whereupon B. re-entered on the lessee. The question was, whether by the entry of C. the land is absolutely discharged of that first limitation, so as B. the eldest son cannot enter upon C. the youngest for this alienation by him? Quære. Mo. 271. pl. 424. Hill. 30 Eliz. C. B. Spittle v. Davis.

after his entry shall hold the estate discharged of the proviso, or any limitation therein contained. —Ow. 8. Spittle's case, S. C. held accordingly per tot. Cur. and judgment accordingly.——Ibid. 55. S. C. in totidem verbis.

*[125]

2 Le. 48. 8. The husband gave lands to his wife during the minority of his son, upon condition that she should do no waste. The husband died, and the widow married again, and died, and this 2d husband committed waste. It was held by the whole court to be no breach of the condition. 2 Le. 35. pl. 46. Hill. 33 Eliz. C. B. Cobb v. Prior.

——Lat. 20. cites S. C. and that it was therein adjudged, that a condition to avoid an estate shall be taken strictly.

9. A. being seised of a manor and lands in fee, made a feoffment to D. &c. to the use of himself in tail male, remainder to E. in tail, provided that E. or any in whom the inheritance in tail of all the premises shall happen to be, shall pay to the daughter of A. 200 l. P. being in possession of part of the lands never attorn'd. Popham and Anderson Ch. J. agreed that the remainder-man in tail is not bound by this condition, for that was, that he who should have the inheritance in tail of all the premises should pay &c. whereas that which was in the possession of P. did not pass for want of attornment, because a condition is to be taken strictly. Poph. 102. Hill. 38 Eliz. Slaning's case.

Nov 56. 10. A. in tail, the reversion in fee to the queen, lets the land for 21 years by indenture, and covenanted that the lessee should enjoy it against all persons without interruption of any besides the queen, her heirs and successors, being kings or queens of England. The queen granted the reversion to W. and then A. died without issue. W. entered and ousted the lessee, who brought covenant, and adjudged that it did lie, for none are excepted but the queen, her heirs and successors, and not her patentees. Cro. E. 517. pl. 43. Mich. 38 & 39 Eliz. B. R. Woodroffe v. Greenwood.

2 Roll. Rep. 11. A. made lease for 21 years to B. and covenanted that the lessee should enjoy it during the term, without the let or disturbance of him, his heirs, or assigns, or any other person, by or thro' his means, title, or procurement, and in covenant the plaintiff set forth, that before the said lease was made to him, Ld P. granted the lands to A. and to M. the defendant his wife, and to the heirs of A. and averr'd that

it was by fine levied by the means and procurement of A. and that A. especially by was dead, and M. turned him out of possession; it was objected, that the wife derived no title from her husband, the covenantor, but from the Lord P. and that this covenant extends only to titles derived under A. and after his estate created; but adjudged that in regard there was an averment, that tho' the wife claims by a title derived from Ld. P. the consor, yet she is in and claims by means of A. her baron, the lessor, and it was by his procurement that the fine was levied, and if that had not been levied, she would have had no estate, and consequently is within the covenant, tho' she claims by title derived from another. Cro. J. 657. pl. 7. Hill. 20 Jac. B. R. Butler v. Swinnerron.

reason of the averment; sed adjournatur. — Palm. 339. S. C. resolved by Ley Ch. J. Doleridge and Haughton (absence Chamberlain) that the condition was

broken; for the words (by his means and procurement) have a large extent; and judgment accordingly.

12. A. leases land to to J. S. upon condition, that if he paid him 3l. per ann. for 5 years next ensuing, then the lease to be void; and afterwards gives a bond with condition to perform all covenants &c. and conditions in the said indenture of lease. Debt being brought upon the bond, the defendant pleaded conditions performed. The plaintiff assigns a breach, that he had not paid the 3l. per ann. according to the condition in the lease. The defendant demurs, and the question was, whether or no the condition of the bond was broken by not paying the 3l. and it was argued for the defendant that it was not, because the defendant had not covenanted to pay 3l. but had it at his election, either to pay the money, or else let the land [or, that the lease should stand good] but Hale seemed to incline that the bond was forfeited; for if the word conditions should not relate to that clause of paying the 3l. it would be void; and he said, suppose the condition of the bond had been only to perform all conditions in the lease, certainly it must have related to that; and now, when it is for performance of all covenants and conditions, it will be as effectual; for the word covenants shall relate to the covenants in the lease, and conditions to this condition. Sed adjournatur. Freem. Rep. 386. pl. 498. Hill. 1674. Anon. [126]

(N. a) To what Things it shall be said to extend.

[1. IF a man that hath certain walks within a forest of inheritance, gives one walk called B. to J. S. in tail, and dies, and his heir recites the said grant, and confirms it, and by the same deed grants another walk called S. in the same forest to him and his heirs, proviso, that the said J. S. shall not cut any trees in aliqua parte premissorum in indentura predicti specificatorum; the condition shall extend to the walk called B. so that if he cuts any of the trees in this walk, the grantor may enter for the condition broke, into the walk called S. for the word premisses comprehends as well that which is confirmed, as that which is granted. Tr. 41 Eliz. B. R. between Evans and Labram adjudged.]

Cro. E. 782. pl. 19. the case of Pembroke v. Symes, Mich. 41 & 43 Eliz. B. R. seems to be S. C. and S. P. resolved per tot. Cur. accordingly for the word (premissa)

extends in this sense to (promentionate) and to avoid his entire grant, and adjudged for the plaintiff. —S. C. cited 11 Rep. 51. a. —S. C. cited by Hobart Ch. J. Hob. 276. —S. C. cited by Coke Ch. J. Roll. Rep. 109.

Hob. 269. [2. If *A.* be in execution at the suit of *B.* and *B.* upon good consideration affirms to *J. S.* that he will not discharge *A.* without his consent, and after *A.* and *B.* agree that *B.* shall make a release to him of the execution, and deliver him, and that *A.* shall enter into an obligation with condition to save harmless *B.* from all suits &c. that may arise upon the release of the said *A.* being in execution at the enfealing thereof, at the suit of the said *B.* in such a sum, from all persons which may any way trouble the said *B.* touching or concerning the said release, that then &c. and after all this is done accordingly, and *J. S.* brings an action upon the case against *B.* upon his promise, and recovers, *A.* ought to save him harmless, otherwise the condition is broke, for this arises by reason of the said release, and so within the words, though the promise made to *J. S.* was the cause of the action of *J. S.* Pasch. 17 Jac. *B.* between *Wylden* and *Wilkinson* adjudged.]

3. The condition of an obligation was, that the obligor should make appropriation of the church of *Dale* such a day to such a house, at his costs and charges discharged of incumbrances; there, altho' there was a pension granted thereout to another, it was holden that the obligee was not bounden to discharge it of that pension. Arg. 3. Le. 44. pl. 64. in case of *Mountfield v. Catesby*, cites 3 H. 7. 4.

4. If a man leases his land for 20 years, upon condition that the lessee shall rake the ditches, and does not say how often, there if he rakes them once he is excused for ever. Br. conditions, pl. 6. cites 27 H. 8. 6.

5. If a man makes a feoffment of his lands with warranty, and covenants, that it is discharged of all rents, there it shall not extend to rent-services, which are incident to the lands of common right. Arg. 3 Le. 44 pl. 64. Mich. 15 Eliz. C. B. in case of *Mountford v. Catesby*.

6. It was said, that if one makes a lease for years, rendering for the first 2 years 10 l. and afterwards 30 l. every year, with condition, if the rent of 30 l. or any payment of it be behind, that the lessor enter, the lessor enters for non payment of the 10 l. but his entry is lawful, for the 10 l. was parcel of the rent, for it was but one rent. 4. Le. 8. pl. 34. Hill. 27 Eliz. *Holland v. Hopkins*.

7. If lands are given to *A.* for life on condition, remainder to *B.* in manner aforesaid; these words (in manner aforesaid) shall refer to the estate for life limited to *A.* and not to the condition, nor to any other collateral matter; per *Fenner*. 2 Le. 69. pl. 92. Trin. 27 Eliz. in case of *Brian v. Cawson*.

Hob. 269. pl. 355. that S. C. says judgment was given for the plaintiff, contrary to the opinion of Hutton, who thought the condition was to be understood only by the words, of damage directly growing by the release, and not by any collateral act dehors as this promise is; but the reason that moved the judges was, that this condition carried a forcible and apparent intent of saving harmless of some damage, which might arise, not upon the release alone, but upon some external and collateral thing besides the release, and yet by the means and occasion of the release; for the words are (to save harmless, &c. from all persons that might trouble him concerning the said release).

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8. If *aliqua lis, vel controversia oriatur in posterum*, by reason of any clause, article or other agreement in the said indenture contained, that then before any suit &c. the parties should choose four indifferent persons for the ending thereof &c. This extends not to the submitting the breach of every covenant &c. but only where disputes arise upon the construction of any covenant &c. Le. 37. Trin. 28 Eliz. B. R. *Parmort v. Griffina*.

9. A. being tenant in tail of certain lands, exchanged the same with B.—B. entred, and being seised in fee of other lands, devised several parcels thereof to others, and amongst the rest a particular estate to his heir, proviso, that he doth not re-enter nor claim any other of his lands in the destruction of his will, and if he do, that then the estate in the lands devised to him to cease. A. dies; his issue enters into the lands in tail, and waives the lands taken in exchange, and before any other entry, the heir of B. enters upon the land given in exchange; and the opinion of the whole court was, that it was no breach of the condition, because that was not the land of the deviser at the time of the devise, therefore it was out of the condition. Godb. 99, 100. pl. 115. Mich. 28 and 29 Eliz. C. B. *Barber v. Topesfield*.

10. Where the proviso is parcel of one sentence, which contains a covenant, or abridgeth the covenant, there it shall not amount to a condition but to an exception; as grant of a rent-charge proviso that he shall not charge the person; so a lease without impeachment of waste, proviso that the lessee shall not do voluntary waste, the same abridges the liberty. Arg. 2 Le. 128. Mich. 29 Eliz. B. R. *Scott v. Scott*.

11. A lease is made of lands for years proviso, that lessee shall not put his cattle on the land from Michaelmas to St. Andrew's tide; per Dyer conditions are *stricti juris*, and conceived that the conditions should be restrained to the first year, and should extend no farther. Per Maanwood, if I am bound that I will not go to London between Easter and Michaelmas, it shall not extend only to the first years after the date of the obligation, but for my whole life. 4 Le. 100. pl. 205. in time of Q. Eliz.

12. The condition of an obligation was, that if the obligor paid so much, then the obligation to be void, or otherwise it should be lawful for the obligee quietly to enjoy such lands. The defendant pleaded, that the plaintiff had quietly enjoyed. The plaintiff demurred, intending that the condition depended only on the payment or non-payment, and that what concerned the land was idle. The court said, that conditions ought to be taken according to the intent of the parties, if it can appear what that is; but as the words (then to be void) are placed here, it can refer only to what precede and not to the land, which follows; and it was said, that the rule of grammar holds in our law, viz. that the words in the beginning or end of a thing refer to all, but that those in the middle refer only to the middle; but they said, that the intent of the parties doubtless was, that the obligee should have either the money or the land, and therefore the court would advise, and recommended an agreement. Sid. 312. pl. 26. Mich. 18 Car. 2. B. R. *Ferrers v. Newton*.

[128]

2 Keb. 107.
pl. 35. S. C.
the court
held the
condition
good enough
and disjunctive,
and (that it
might be
lawful to
ter) implies,
that the
party would
deliver up
possession, &
adjournatur,
—Ibid. 117.
pl. 63. S. C.
adjournatur,
because the
court

court would not adjudge it for the plaintiff.——Ibid. 137. pl. 89. the court agreed, that judgment ought to be for the plaintiff, the words after the condition being infeasible, and the parties not agreeing.

Lev. 272. *13. A. and B. brought debt upon a bond, the defendant pleaded the release of B. but upon oyer it was of all actions &c. which he had &c. against the defendant upon his own account; the plaintiffs replied, that this bond was not taken upon his own account; upon which issue was taken and found for the plaintiffs; it was moved in arrest, that this was a frivolous issue, for the release of one obligee discharged the bond; but the court seriatim delivered their opinions for the plaintiffs; for B. who gave the release, might take the bond (and so the truth was that the bond was made to him and A.) as a security for a debt with which he was intrusted for another. Vent. 35. Trin. 21 Car. 2. B. R. Noke's case.*

But states it only as of an action brought by B. alone, to whom the bond was given in trust for others, and adjudged that his release to the obligor of all demands on his own account, did not release the bond.——S. C. cited Lev. 200, 201 ——2 Keb. 530. pl. 37. S. C. adjudged for the plaintiff.

Sty. 18. *14. In the condition of a bond it was recited, that a sheriff had constituted defendant bailiff of a hundred in his county, if therefore the defendant shall duly execute all warrants to him directed, that then &c. It was adjudg'd, that the words (all warrants) shall be intended only all warrants directed to defendant as bailiff of the said hundred, and not other warrants; per Twifden J. 2 Saund. 414. Pasch. 24 Car. 2. in the case of Lord Arlington v. Merrick, as the case of Horton v. Day.*

Pasch. 23 Car. B. R. Stoughton v. Day, S. C. ruled accordingly, that the plaintiff Nil capiat per billiam nisi.

——All.

10. Pasch. 22 Car. B. R. the S. C. resolved, that though the words of the condition were generally to make returns of all warrants directed to him, yet it was to be understood of such only as were to be executed within the hundred of which he was made bailiff.

2Vent. 126. *15. A. leased three houses to B. for 41 years, rendering rent, and Dowe v. B. covenanted to pull them down, and in the same place to build three new substantial houses, and during the said term well and sufficiently to repair the same, and to yield up the same sufficiently repaired at the end of the term. B. instead of building three houses only, built five, and permitted one of them at the end of the term to fall down. A. assigned a breach in not repairing one house built on the premises; the defendant pleaded, that he pulled down three houses, and built three more on the ground where they stood according to his covenant, which were kept in repair during the term, and left in repair at the end thereof, and concluded to the country. The whole court held that he by this covenant must keep and leave all the five houses well repaired; for though in the first covenant he was bound to repair all the houses agreed to be built (which were three) yet by the last covenant he is bound to repair dicti premiffa ac domos superinde erect' (not agreed fore erect' superinde erect' but indefinitely) which extends to all the houses which shall be built on the premises within the term. Lev. 264. Trin. 1 W. & M. in C. B. Doufe v. Earl.*

21. *16. One devises to his son by his second wife in tail male, remainder to his eldest son by his first wife, provided that if the land should come to his eldest son, then he or his heirs should pay 1000 l. to the testator's daughters, within four months after the estate should come to them, and*

but Rookeby J. doubted, it seeming to him to be all as one covenant, and so all the subsequent matter concerning leaving [129] the houses well repaired, should be restrained and understood of those agreed to be built.

and in default of payment the trustees to enter and raise the money. The son by the first wife dies, leaving a son. The son by the second wife suffers a recovery of a moiety of the lands, and dies without issue, so that the moiety only of the premises comes to the son of the son by the first wife. Though no part of the premises ever came to the eldest son, yet the moiety of the lands shall be liable to the payment of the whole 1000*l.* without any apportionment. 2 Vern. 359. pl. 324. Mich. 1698. Hooley v. Booth & al.

(O. a) When a Thing is limited to be done, by whom collateral Things which conduce to the Performance thereof shall be done. By whom they shall be done.

[1. **W**HERE a man is bound to do a thing, he ought to do all that which depends thereupon in the performance of the thing. 11 H. 4. 25. b.]

[2. (*As*) if the condition be to levy a fine to the obligee, and it is not determined at whose costs it shall be done, it shall be at the costs of him that ought to levy the fine, for this depends upon the other. 11 H. 4. 15. b. Cur.]

[3. (*And*) upon such a condition, the obligor ought to sue out a writ of covenant in the name of the obligee, and the obligee is not bound to do it. 11 H. 4. 25. b.]

Hutton J. Litt. Rep. 14 Hill. 2 Cas. C. B.

[4. If the condition be to levy a fine upon warning, a warning by the sheriff upon a writ of covenant is not sufficient, (for perhaps he cannot know by this, whether it be to levy a fine or other action) but it ought to be upon warning by the obligee himself. 11 H. 4. 18.]

29 E. 3. 44. b. contra.

5. Debt on bond to pay money, if A shall be then living, and shall before the 20th of May, by due form and course of law, perfect, levy, and acknowledge a fine and a recovery before his majesty's justices of C. B. of and in certain houses and tenements, with the appurtenances, which the said B. lately had and purchased of A. Defendant pleads that A. is living, and did not levy &c. and the question on demurrer was, if B. or A. should levy the fine? and held that B. should levy it. Brownl. 76. Hill. 10 Jac. Manchester v. Draper.

next antecedent, viz. A. though the words (if A. be then living) come in in a parenthesis.

6. If a man covenants to convey lands, it ought to be done at the charge of him that covenants to do it, except the contrary be agreed. Sic dictum fuit. Sty. 280. Trin. 1651.

(P. a) Con-

Pol. 423. (P. a) Condition for Assurance. How it shall be performed.

S. P. by [1. IF a man covenants to make such assurance of the manor of D. Popham accordingly, as the counsel of the other shall devise, and the counsel devises quod curia conceffit. that he shall be obliged in a certain obligation, that the other shall occupy the manor peaceably &c. he is not bound to perform it, for Cro. E. 370. this is no assurance within the intent of the covenant. Hill. 37 pl. 11. in Eliz. B. R. per Curiam.]
 case of Thoraborough v. Mompeffon, S. C.——Lutw. 679. Arg. citat S. C.——Assumpsit in consideration of a sum of money paid to the defendant, he promised to assure copyhold lands to the plaintiff in such manner as D. should advise, who advised that the defendant should make a surrender at the next court &c. and should enter into a bond of 40 l. to the plaintiff, for the enjoying the land against all persons, which he had not done; adjudged per tot. Cur. that the breach in not entering into the bond was ill, because it was out of the assumpsit, and therefore the defendant is not bound to perform it. Cro. J. 115. pl. 1. Pasch. 4 Jac. B. R. Staynrode v. Locock.——Noy 124. Stanred v. Laycock, S. C. says, that the obligation is not part of the assurance, and was out of the reference to D. [but the report seems not very clear.]

S. P. by [2. [But] if a man be obliged to do such acts for the assurance of Popham, the manor of B. as the counsel of the other shall devise, and the Cro. E. 370. counsel devises that he shall make an obligation or statute that the 371. in case of Thorn- other shall enjoy it, he ought to perform it, otherwise he hath broke borough v. his covenant. Hill. 37 Eliz. B. R. per Popham.] Mompeffon

——Condition of a bond, that if the defendant do before Michaelmas make, acknowledge, and offer all and every such act and thing, whatsoever they be, for the good assuring, and the sure making of the manor of D. to J. S. and his heirs, that then &c. Here if the plaintiff requests a fine, a proffment, a recovery, a bargain and sale, he ought to do all; for he is to make all and every act whatsoever for the assurance of the manor of D. but he is not bound to make any obligation or recognizance for the enjoying of the manor, for this is but a * collateral security, and not any assurance, and if the plaintiff request the defendant to convey the manor in generalty, the defendant at his peril ought to do this by any kind of assurance, and if upon this request the defendant make a feoffment of the manor, yet if after this the plaintiff requests a fine, the defendant must acknowledge a fine also, and so upon every several request he ought to make several assurances. Yelv. 44, 45. Hill. 1 Jac. B. R. Pudsey v. Newlam.——Mo. 682. pl. 938. S. C. adjudg'd that general request is sufficient, and the obligor at his peril must do what is sufficient for the assurance.——Brownl. 84. S. C. but seems only a translation of Yelv.

* S. P. As to the not being compellable to give any collateral security, agreed per tot. Cur. Brownl. 93. Pasch. 5 Jac. in case of Stamford v. Cooke.——Cro. J. 115. pl. 1. Pasch. 4 Jac. B. R. Staynrode v. Locock, S. P. by the opinion of the whole court.

Cro. E. 370. [3. If a man covenants to make such assurance as the counsel of pl. 11. Hill. the covenantee shall devise of an annuity of 30 l. and of 200 l. in 37 Eliz. B. R. money, and the counsel devises that he make an obligation in which Thornbo- he shall oblige himself, his heirs, executors, and administrators, to rough v. pay to the other the annuity, and also the 200 l. at certain days, he Mompeffon seems to be is not bound to perform it; for this obligation is not any assurance S. C. It of the annuity, dubitatur. Hill. 37 Eliz. B. R.]
 was moved, that this was not within the covenant, because the devise was, that he should bind him and his heirs, whereas there is no word in the covenant that the heir should be bound; but the court gave not any answer thereto, and it was ended by arbitrement.

[131] [4. If A. covenants to make such assurance for the payment of 100 l. to B. as his counsel shall devise, and his counsel devises that A. shall

A. shall make an obligation of 1000 l. for the payment of 100 l. he ought to perform it. Hill. 37 Eliz. B. R. per Popham.]

[5. But if the covenant in this case had been to make such reasonable assurance as the counsel of the covenantee should devise, it had been otherwise; for it is not reasonable to make an obligation of 1000 l. for the payment of 100 l. Hill. 37 Eliz. B. R. per Popham.]

[6. If A. covenants with B. to make such reasonable assurance to B. in fee of such lands, reserving to A. and his heirs 20s. rent per ann. as the counsel of B. shall advise, and after B. tenders to A. a deed-poll, by which A. infeoffs B. of the land in fee, reserving the said rent to A. in fee; this is not such reasonable assurance to bind A. to seal; for this is a rent-seck, and the deed appertains to the feoffee, and then A. without the deed cannot have any remedy for the rent. Mich. 11 Car. B. R. between Guppge and Ascue, per Curiam.]

[7. But if A. by indenture grants and sells lands without livery or inrollment to B. in fee, reserving 20s. rent to him and his heirs, and covenants to pass any further reasonable assurance as the counsel of B. shall advise, and after the counsel advises a feoffment by deed-poll, reserving the said rent in fee; this is a good assurance within the covenant, so that A. is bound to seal it; for there the reservation does not depend only upon the deed-poll, but upon the indenture which directs the use of the feoffment, by which A. may recover the said rent-seck without shewing the feoffment. Mich. 11 Car. B. R. between Guppge and Ascue, per Curiam, upon a demurrer, but ordered the parties to make a new feoffment by indenture, rendering the rent. Hill. 10 Car. Rot. 1337. But after the parties could not agree, and so this judgment was given against the plaintiff, scilicet, against their opinion before, because the deed tendered was a deed-poll, the which should be after the execution thereof in the possession of the plaintiff; and (*) then the defendant could not without the deed have his rent, not being able to prove the feoffment.]

[8. If the condition of an obligation be to make the obligee or his assigns as good a lease as counsel could advise, and after the obligee comes to the obligor, and appoints him to make a lease to J. S. he ought to make it accordingly, though no counsel advised it, but the obligee himself; for by the words it is not necessary to have the advise of counsel, but only that the lease should be as good as counsel could advise. Pasch. 14 Jac. B. R. between Allen and Wedgerwood, per Coke, but Dodderidge e contra.]

Roll. Rep. 373. pl. 28. S. C. and Coke Ch. J. thought, that if the words had been, that he should make as good a lease as counsel should devise, he ought to have brought a lease drawn by advice of counsel; but that it seems otherwise here, because the word is not devise, but advise. — Mo. 595. pl. 811. same diversity by Popham. Pasch. 35 Eliz. Stafford's case. — In such case Ld. Anderson said, that if obligee devise the assurance himself, and makes it, the obligor is not bound to perform it; for he is only to make the assurance that the obligee's counsel shall advise, and not that which himself shall devise, and that it is a good plea that consilium non dedit advocatum. Cro. E. 9. pl. 1. Mich. 24 & 25 Eliz. C. B. in Bennett's case.

[9. If the condition be to assure certain lands to such persons as the obligee shall name, and after he assures it to the obligee himself; this is

a good performance of the condition, tho' it be not alledged that the obligee named himself, for this *acceptance is a nomination of himself.* Mich. 13 Ja. B. between *Howsego and Wild*, per

[132] Curiam.]

• Cro. E.
298. pl. 9.
Pasch. 35.
Eliz. Staf-
ford v. Bot-
torne S. C.
adjudged for
the plaintiff.
—Mo. 595.
pl. 311. Staf-
ford's case.
S. C. ad-
judg'd for
the plaintiff.
—† Br.
Conditions,
pl. 247.

[10. If the condition be to make such assurance in the law of certain lands to the obligee, *as by the counsel of the obligee upon request made shall be advised*, and after J. S. was of counsel with the obligee, and gave his *advice to the obligee, that the obligor should make a certain assurance, and the obligee gave notice to the obligor of* of the said advice, *and required him to perform it*, he ought to perform it, or otherwise the condition is broke; for it is more convenient that the counsellor should give the advice to the obligee than to the obligor, for the obligor does not know whether he be of his counsel in this matter, for he may be of his counsel in one thing and not in another. Co. 5. * *Higginbottom's case*. 19. b. adjudged. See † 11 h. 7. 21.]

cites S. C. that the devise ought to be notified to him who is to make the estate. — 5 Rep. 20. a. cites S. C. as held by all the justices. 11 H. 7. 21. that the counsel ought to be given to him who is to make the estate, and not to him with whom he is counsel; but that upon consideration of the book, and of the residue of the case after 11 H. 7. 23. b. it appears plainly otherwise, and so it was resolved in *Higginbottom's case*. — But if the party himself notifies other advice to him, who was to make the estate, than the counsel gave, if the covenantor knows of it he may refuse, if he does not know of it, and the counsel notified it according to his covenant and agreement, and he performs it, he is excused; and if it be not according to his covenant he may refuse it, and so no mischief to the party. 5 Rep. 20. Pasch. 35 Eliz. B. R. in *Higginbottom's case*.

• And. 53.
pl. 132. S. C.
but I do not
observe S. P.
there. —
S. C. & S. P.
does not seal it
presently the
condition is
broke, because
the condition
is peremptory,
scilicet, to be
performed
presently. D. 16
Eliz. 338. S. 39.
between * *Wootton and Cooke*; Co. 2. † *Mansfers*. 3 ad-
judged.]

[11. If the condition be to make such assurance, &c. to the obligee *as the obligee shall devise*, and after the obligee devises an indenture, &c. and tenders it to him, and he requires time to shew it to his counsel to be advised thereupon, which is denied to him, yet if he S. C. & S. P. does not seal it presently the condition is broke, because the condition is peremptory, scilicet, to be performed presently. D. 16 Eliz. 338. S. 39. between * *Wootton and Cooke*; Co. 2. † *Mansfers*. 3 adjudged.]

when he knew the last instant of the time, he ought to have had his counsel there ready with him. 4 Le. 63. in pl. 156. — Bendl. 228. pl. 260. S. C. and the pleadings.

† 4 Le. 62. pl. 156. Hill. 26 Eliz. C. B. and S. C. the assurance was condition'd to be made the 1st of Jan. and on 31st of Dec. before sun-set the obligee came to the obligor with a deed ready to be seal'd, and required the obligor to seal it, who said he would shew it to his counsel, and then he would seal it; the court held the obligation forfeited. — Mo. 282. pl. 326. S. C. states the condition to be, that the defendant and his son should make such assurance, and that the son (who was a stranger) refused it on account of illiterature, and therefore required to shew it to his counsel. The justices doubted; but at another day Anderson said his opinion was, that the plea was not good. — See (I. b) pl. 4. S. C. — See (L. b) pl. 3. S. C. — 4 Le. 190. pl. 298. cites S. C. — Mo. 243. pl. 284. Mich. 25 & 26 Eliz. *Androse v. Eden*, S. P. exactly, held accordingly. — And. 122. pl. 171. S. C. & S. P. exactly. — S. C. cited Mo. 283. as agreed lately on the point of time being limited.

Roll. Rep.
71. pl. 13.
Mich. 12
Car. B. R. by
Doderidge
Obiter, quod
suit concess-
um; per
Coke. — Cro. E. 371. pl. 11. Hill. 37 Eliz. B. R. the S. P. moved, but the court gave no answer thereto, and it was ended by arbitrement.

[12. If a man assumes to be obliged in an obligation to J. S. and an obligation is tendered, in which he, his heirs and executors are bound, he ought to seal it, because this is the common course to make obligations in such manner, though the heir or executor was not named in the promise. Mich. 12 Jac. B. R. per Coke and Doderidge.]

[13. If

[13. If a man be bound to make a conveyance of certain lands, if S.P. by Coke a warranty or covenant be put in the deed, he is not bound to seal it. Mich. 12. Jac. B. R. per Coke.]

Ch. J. Roll. Rep. 71. in pl. 13. — Le. 29. 12

pl. 34. Palsch. 27 Eliz. says it has been adjudged, that if B. be bound to A. in an obligation to assure to him the manor of D. &c. if A. tenders to B. an indenture of bargain and sale, in which are many covenants, B. is not bound upon the peril of his bond to seal and deliver it.

[133]

[14. If a man assumes to become bound with J. S. and J. D. to B. in a certain sum, and B. tenders an obligation in which they should be obliged jointly and severally, he is not bound to seal this, for by the assumption a joint obligation is intended. Mich. 12 Jac. B. R. between Malcot and Deane adjudged.]

Roll. Rep. 71. pl. 13. S.C. adjudged. — 2 Bulst. 287. S. C. adjudged.

[15. So if a man assumes to become bound with J. S. and J. D. to B. per *hujusmodi scriptum* and payable at such a time as two strangers should agree between them, and the strangers agree, that the obligation should be joint and several, yet he is not bound to seal it; for by the promise, a joint obligation is intended, and the word *hujusmodi* gives no power to alter that which the law made joint, but only refers to the sum and time. Mich. 12 Jac. B. R. between Malcot and Deane adjudged. It seems that this exposition is most strict.]

Roll. Rep. 71. pl. 13. S.C. adjudged; for the general words (*Hujusmodi scriptum*) shall not be referred to that which was certain

before, but to that only which was uncertain, and that was the sum and the time. — But *ibid.* the reporter makes a doubt of this reason, and says, that (*hujusmodi*) imports rather the manner of the obligation, as whether it should be joint and several, than the sum or the time. — 2 Bulst. 287. S. C. adjudged, but the (*per hujusmodi scriptum*) does not appear there.

[16. If a man covenant for further assurance to levy a fine of all his land in D. and at the time of the covenant he is seised only of two (*) in D. and after two other houses descend to him, and the covenantee tenders him a fine of four houses to be levied by him, he is not bound to levy it; for this will comprehend the other two houses, of which he is not bound to levy a fine; and though the use of these two houses which are not within the covenant shall be to the conusor, yet he is not bound to levy a fine of them; for perhaps he is tenant in tail of them, and this will dock the intail. Mich. 12 Jac. B. R. between Wilton and Welch, adjudged.]

2 Bulst. 317. S. C. adjudged. — Fol. 425.

judged. — Roll. Rep. 103. pl. 42. S. C. adjournatur. — *Ibid.* 117.

pl. 1. S. C. adjudged per tot. Cur. — A. sold to B. 3 yard land, and covenanted for further assurance. A. tender'd a note of a fine. Two messuages, &c. were comprised more than were sold, or intended to be assured, and exception was taken, that the fine being tendered of more than he ought to levy, he is not bound to levy any fine at all; but the whole court to the contrary; for though the fine be levied of more than it ought to be it is not material; for of the residue it is the use of the conusor himself. Cro. J. 251. pl. 4. Mich. 8 Jac. B. R. Bouldney v. Curtis. — Bulst. 90. S. C. the court held it good, and that it was done according to the usual form. — Mo. 810. pl. 1096. S. C. but S. P. does not appear. — 2 Bulst. 318, 319. Arg. *citra* S. C. as of a fine tendered of a house and 20 acres of land, and that defendant refused, and said, that he was seised of the house and 10 acres, and also of other 10 acres, which he d'd not sell, and that these 10 acres also were contained in the note of the fine, the which he never intended to pass, and therefore refused to acknowledge the fine; but resolved that the plea was not good. — S. C. cited Roll. Rep. 117. as of a bargain and sale of all his lands in D. and a covenant for further assurance to levy a fine of them, and the fine tendered contained a house and a certain number of acres; and defendant pleaded, that at the time of the bargain he was seised of a house and 4 acres, which he sold, and this fine contained those [and more] being so many in number, but adjudged no good bar. — If the covenant is to levy a fine of 10 acres, and the fine contains more, it is not good; but otherwise where it is to levy a fine of all his lands in D. Coke and Doderidge said, the case of Bouldney v. Curtis, differed from this of Wilton v. Welch, for it is hard to put the certainty of acres; because by the measure of one man it may be more than by the measure of another, whereas here 4 houses may be well known from 2.

Condition.

[17. If the condition of an obligation be, that if he makes a good, perfect and absolute assurance in fee to the obligee of certain copyhold lands, then &c. if he after surrenders it upon condition of payment of money, and the surrender is presented accordingly, this is not any performance of the condition, because the assurance ought to be absolute without a condition. Pasch. 8 Jac. B. between *Risbonne and Gory* per Curiam.]

[18. So if a covenant be with a purchaser to make further assurance, if he make an assurance upon condition, this is not any performance of the covenant. Pasch. 8. Jac. B. per Curiam.]

[134]

Scy. 256.

Shann v.

Shann, 8 C.

Roll Ch. J.

held the sur-

render inef-

fectual, and

ordered judg-

ment to stay

till plaintiff

move

Ibid. 280.

Shann v.

Bilby, judg-

ment nisi,

&c.

[19. If A. in consideration that B. at the request of A. would surrender a copyhold tenement, parcel of the manor of D. to A. in due form of law, according to the custom of the manor, to the use of A. and his heirs, assumes to B. to pay him 20l. in an action upon the case by B. against A. for the 20l. if he avers the performance of the consideration, that he after, at the request of A. surrendered by a straw to one J. S. (a customary tenant of the said manor) the said tenement into the hands of the lord of the said manor, according to the custom of the said manor, to the use of A. and his heirs, and yet the defendant A. had not paid the 20l. This is not a good performance of the consideration which is a condition precedent, for he is bound to make an effectual surrender to the use of A. and his heirs at his own costs, and he hath made a surrender here into the hands of a tenant of the manor, which is a good beginning of a surrender, yet it is not a compleat surrender till it is presented in court, and he hath taken upon him to make a perfect surrender, and therefore he ought to procure the tenant to present it at the court according to the custom, and to procure a court to perfect it, which does not appear to be done. T. 1651. between *Shan and Bilby*, adjudged per Curiam this being moved in arrest of judgment quod querens nil capiat per Billam. Intratur Hill. 1650. Rot. 1605. For if a man be bound to make a feoffment to me upon request, if I request him to make a deed of feoffment with a letter of attorney to B. to make livery to me, and he does it accordingly, this is a good beginning; yet if livery is not made, this is a forfeiture of the condition.]

Cro. E. 476. 20. If a man bargains and sells 100 acres of wood, this shall be in pl. 4. Arg. measured according to the usage of the country, viz. according to 20 cites 8. P. feet to the rod, and not according to the statute. For consuetudo as adjudg'd in *Andrews's* loci est observanda. 6 Rep. 67. a. per Cur. cites 47 E. 3. 18. a. case.

But if one sells land, and is obliged [or covenants] that it contains 100 acres, this shall be according to the law, and not according to the custom of the country; per *Gawdy* J. Cro. E. 267. pl. 2. Hill. 34 cites B. R. — *Popham* said, that it had been resolved by all the justices, that if one be obliged to assure 20 acres of land, the acres shall be accounted according to the estimation of the country where the land lies, not according to the measure limited in the statute. Cro. E. 665. pl. 15. Pasch. 41 E. 3. C. B. *Some v. Taylor*. — See Tit. weights and measures, pl. 5. *Morgan v. Tadcastle*, and pl. 34. *Barkdale v. Morgan*.

Fitzh. Dette

pl. 81. cites

S. C. —

Perk. S. 775.

[but it

21. If a man be obliged to make to another a sure, sufficient and lawful estate, in certain land, by the advice of J. D. here if he makes an estate according to the advice of J. D. be it sufficient or not, lawful

lawful or not lawful, yet he is excused of the obligation. 5 Rep. ^{should be 766.] S. P. and cites S. C.} 23. b. cites 7 E. 4. 13. b.

22. Debt; a man was bound in 1000l. to make such estate by a day which the counsel of the plaintiff should advise, and he said that the counsel did not give advice, and a good plea; and so had he pleaded that no advice was given, and because he pleaded in the negative, he need not shew the names of the plaintiff's counsellors; but if the plaintiff replies, that the counsel did give advice, he shall shew their names. Br. pleadings, pl. 78. cites 6 H. 7. 4.

23. In an action of covenant brought, one of the covenants in the indenture was, that the defendant ought to make and suffer for the assurance of the plaintiff, all things that should be devised by the counsel of the plaintiff, if he were required, and the defendant taking protestation, for plea said that he was not required; to which the plaintiff replied, that J. S. was of his counsel, who devised a release, which he required the defendant to seal, but he refused to do the same; to which the defendant rejoined *que ne refusa pas*, and by all the court holden a departure, and that the defendant ought to have pleaded at first *non requisitus fuit*; and the plaintiff in his replication needed not to have spoken of any refusal, in as much as the defendant had pleaded in the negative *quod non fuit requisitus*. Heath's Max. 48, 49. cites 28 H. 8. D. 31. [b. pl. 217.]

24. A man by deed indented, bargained and sold land unto another in fee, and covenanted by the same deed to make to him a good and sufficient estate in the said land before Christmas next; and afterwards, before Christmas, the bargainer acknowledged the deed, and the same is inrolled; it was the opinion of all the justices of C. B. that by that act the covenant-aforesaid was not performed, for the bargainer in performance of the same ought to have levied a fine, made a feoffment, or done other such acts. 3 Le. 1. 2. pl. 2. 6 E. 6. in C. B. Anon. And. 27. pl. 61 Anon. but S. C. held accordingly. — Bendl. 36. pl. 62. Anon. S. C. held accordingly.

25. A. was bound in a bond to B. for performance of covenants; afterwards B. gave bond to A. conditioned to release A.'s bond to B. as the counsel of A. should advise. A.'s counsel advised that B. seal a release of all demands to A. and to one W. who was a stranger to the covenant, and averr'd that there was no other matter between them, but said nothing of W. The court held clearly that the request was unreasonable, and that B. was not bound to seal the deed. D. 218. a. pl. 3. Mich 4 & 5 Eliz. Fortescue v. Strode.

26. The condition of a bond was, that whereas the obligee had an estate for life, &c. by a lease made by A. B. if the obligor and his heirs do at all times ratify, confirm, and allow the said lease, and suffer the obligee to enjoy the premises, &c. that then, &c. In an action of debt brought on this bond, the defendant pleaded, that at all times after the making the bond, he has ratified, confirmed, and allow'd the said lease, &c. The better opinion was, that the plea was ill, for he ought to have pleaded a confirmation in deed in writing, and so the party confessed the action, and warr'd the demurrer. D. 229. b. pl. 51. Trin. 6 Eliz. Anon.

27. An indenture of covenant between A. and B. in which A. covenanted, in consideration of a marriage to be between his son and the

A. covenanted with B. to make the

an assurance of a jointure to the feme before Mich. at the charges of B. Adjudg'd that B. need not tender the charges, because it is uncertain what manner of assurance he will make; but otherwise if it had been certain, as by fine, &c. Per Cur. D. 371. Marg. pl. 1. cites Mich. 38 and 39 Eliz. C. B. Anon.—Ibid. says it was also resolv'd Pasch. 35 Eliz. in St. Albon's term.

If B. reports falsely to A. the advice of his counsel, yet if A. performs it according to B's report it is sufficient, and B. cannot vary from it, but has dispensed with A. for any other. Cro. E. 299. pl. 9. Pasch. 35 Eliz. C. B. in case of Stafford v. Bottonne.

29. The condition of an obligation was, to perform covenants in a pair of indentures, and the covenant wherein the breach was assigned was, that if R. W. brother of the plaintiff should say, Make assurance of such a manor to the defendant as the counsel learned of the said defendant should advise, then if the defendant pays unto the plaintiff 50 l. the obligation to be void; The defendant, by advice of counsel, demanded a release with warranty, &c. And by Periam and Windham, the same is not any assurance, but a means to recover in value; Anderson contrary, that it was a collateral warranty, &c. 2 Le. 130. pl. 172. Pasch. 27 Eliz. C. B. Wye v. Throgmorton.

Ow. 65. Mich. 36 & 37 Eliz. B. R. Bag-nall v. Porter, S. C. Coke was clear of opinion, that the bargainee ought to have sealed the acquittance and release, for unless the deed mentions the payment, the bargainee and his heirs may claim the land for default of payment; to which Gawdy agreed, and cited 19 E. 4. but Popham doubted; but at last the matter was referred to arbitration.—D. 212. Marg. pl. 3. Mich. 36 Eliz. C. B. Reynell v. Proctor, S. P. and seems to be S. C. and reported according to Ow. 65.

30. J. S. the bargainee covenanted, on payment of 100 l. at a certain day and place, to stand seised of the land to the use of A. the bargainor, and his heirs, and also to make such assurance for security of the land as should be devised by the counsel of A. and entered into recognizance to perform the covenants. A. paid the money before the day, and at another place, and after the day tender'd a deed to be sealed by J. S. containing the receipt of the money, and also a release of all his right in the land, which J. S. refused to seal; The court doubted if by the refusal the recognizance was forfeited, because the acquittance for the money is not assurance of the land, and so not bound to seal the deed, comprehending this matter as not being pertinent to the assurance of the land; but the court held that the acceptance of the money at another place, and before the day, was sufficient to excuse the recognizance, as well as the covenant on which the recognizance depended. Mo. 366. pl. 502. Hill. 33 Eliz. Anon.

31. Debt upon obligation, the condition was to make such assurance as by the counsel of the plaintiff should be devised; the plaintiff himself causeth such an assurance to be drawn, and put wax to it, and required the defendant to execute it, and he refused; It was the opinion of the whole court that it was no breach of the condition. Cro. E. 297. pl. 8. Pasch. 35 Eliz. C. B. More v. Rosewell.

for if the party himself may devise it, then it will be no plea to say that consilium non dedit adinventum. — S. P. adjudg'd contra Cro. E. 465, 466. (his) pl. 20. Pasch. 38 Eliz. B. R. Clifton v. Gibbon; for to have advice of counsel is only for the strengthening of his assurance, and if the plaintiff at his own peril will inquire of it himself, the defendant ought to do it as he requires.

32. K. on 22 Jan. 38 Eliz. promised to make such assurance to B. of all his lands in Y. as S. should appoint. S. the same day appointed that K. should make a bargain and sale of all his lands in Y. On the 14th Sept. 39 Eliz. K. tender'd to B. a bargain and sale of all his lands in Y. and whether B. was bound to execute it was the doubt. Gawdy and Fenner held that he was not bound, because he might have other lands in Y. 14 Sept. 39 Eliz. which he had not at the time of the agreement, but Popham e contra, & adjournatur. Cro. E. 660. pl. 8. Pasch. 41 Eliz. B. R. Keeble v. Browne.

more land, and that the assurance is well tendered, and that the defendant ought to seal it, unless he can shew that he had more lands afterwards purchased. But Gawdy held, that it shall be intended that he had no more land, but he doubted whether he was bound to seal it, because it is variant from the covenant.

33. It was holden by Popham and Fenner, that if one be bound to make such assurance of all his land, as another will devise and require, if it be to be done at the costs of the deviser, he may devise one assurance of one part, and another of another part of the land; but if it be at the costs of him who is to make the assurance, the other can devise but a joint assurance for the whole land, unless it be necessary. Mo. 570. pl. 780. Trin. 41 Eliz. B. R. Washington v. Burgon.

34. If a man be bound to make a feoffment in fee to the obligee, [137] and he makes a lease and release to him and to his heirs, the condition is well performed, because this in law amounts to a feoffment. Co. Litt. 207. a.

35. Condition was, that husband and wife being lessees for life of land, should levy a fine to a stranger at the costs of the stranger, and also that they should levy a fine of other lands, which they also held for their lives, to a stranger, and at their charge. Obligor pleads that husband and wife offer'd to levy the fine, if the stranger, to whom the fine was to be, would bear the charges; obligee demurs; it was held that the levying the 2d fine has no reference to the 1st, because they are two distinct sentences, and the words (and also) make them so, and judgment pro Quer'. Brownl. 94. Pasch. 4 Jac. Hollingworth v. Huntley.

36. A man covenanted to make further assurance upon request, be it by fine, &c. The plaintiff delivered to him a note of a fine, and required the defendant to acknowledge the same before the justices of assize, and he did not acknowledge it; the defendant demurred, because

5 Rep. 19.
b. Rosewell's
case, S. C.
held accordingly,
and
that with
this agrees
6 H. 7. and
11 H. 7. 21.

S. P. Cro. E.
682. pl. 12.
Trin. 41
Eliz. B. R.
in case of
Washington
v. Murden,
and held by
Popham and
Clinch, that
it shall not
be intended
that he had

unless he
can shew that
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lands afterwards
purchased.

But Gawdy held, that it shall be intended

that he had no more land, but he doubted whether he was bound to seal it, because it is variant from the covenant.

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are usually levied without any writ of covenant pending, as fines levied before the justices of assize.

cause no writ of covenant was first brought or depending; but adjudged that the covenant was broken, because the acknowledgment of the note for a fine is an act preparatory for levying a fine, upon which a writ of covenant may afterwards be sued out, and so it is an act for further assurance, though writ of covenant be not pending. Mo. 810. pl. 1096. Hill. 6 Jac. B. R. Boldney v. Curtis.

37. Debt on bond for performance of covenants in a deed in which 'twas covenanted, that vendor should make further assurance at the costs and charges in the law of the purchaser. Breach alledged, that a note of a fine was devised and ingrossed in parliament, and delivered to vendor to acknowledge the fine at the assizes, which he refused to do and demurred to the breach, because he did not offer costs to the vendor, and the court held it to be idle. Brownl. 70. Pasch. 11 Jac. Preston v. Dawson.

Cro. J. 572. S. C. says it was held that the breach was not well assigned, but they would advise thereof, and afterwards being moved again, they

38. The plaintiff offered to make such assurance of certain land as the plaintiff should devise, and the plaintiff devised assurance with covenant for the enjoying of it, and 'twas resolved by Doderidge and Haughton J. (Mountague Ch. J. being absent) without any scruple, that this was no assurance, for the covenant is collateral, and cannot be called an assurance; but Haughton J. said, that assurance with special warranty may be under the name of assurance, though it is collateral. 2 Roll. R. 191. Trin. 18 Jac. B. R. Coales v. Kirmer.

all held their former opinion, That this assurance with these covenants was not within the promise, and so the breach ill assigned, and adjudged it for the defendant. Colcs v. Kinder.—See pl. 49.

2 Roll. Rep. 333. S. C. and Lee Ch. J. said, that where the land is certain he need not shew his evidence to the counsel,

39. L. covenants with G. to make a jointure to his wife within one year after marriage, of lands in England of the clear yearly value of 500l. so as A. and B. (two counsellors at law) should devise and advise, L. must give notice to A. and B. what lands he intends to settle, and of what estate therein he is seised. The whole court held the plea not good. Godb. 338. pl. 433. Trin. 21. Jac. Gorge v. Lane,

nor of what estate he is to be seised, and he thought it would be the same where the land is not named, but that it is sufficient to give notice of the land, and not to shew his estate in evidence; and Doderidge J. agreed to the first, viz. where the land is named, but not to the second; and Haughton J. said nothing.—But if a man is bound to make such assurance of land as J. S. shall advise, he is not bound to shew his evidence, but he ought to shew the party where the land is and where it lies, and the obligee must seek out the estate at his peril; and then J. S. may advise conditionally, viz. if he has a fee such an assurance, and if a tail such an assurance, and if a remainder over then to devise a recovery; per Ley Ch. J. Godb. 339. in S. C.

[138] 40. But if the covenant be to make a jointure &c. as the counsel of the covenantee shall devise, he must give notice to the covenantee what lands he is determined to settle, and he must inform his counsel, per Doderidge. Godb. 339. Trin. 21 Jac. in case of Gorge v. Lane.

Another exception was, 41. A. covenanted, that he and his assigns, and all other persons having right to the land, should at all times within seven years, at the request and costs of B. the obligee, make, acknowledge, &c. all and every act &c. be it by fine or fines &c. or otherwise whatsoever, which

which by his counsel should be advised or required, and shewed the advice and request of a fine by such a counsel and a *ded. potest.* to J. S. & W. R. to take the consuance, but that the obligor being requested &c. refused. Exception was taken, that he did not shew that the writ was delivered to the commissioners, and that it appeared by the fine pleaded that it was with warranty, and that if I covenant to levy a fine I may refuse to levy it with warranty; by Jones J. the covenant is not to levy a fine, but to do such acts as shall be required; and by him and Doderidge there is a difference between a covenant *cognoscere finem*, and *levare finem*; and for the reasons given by Jones and Doderidge the court was against the defendant. Lat. 186. Trin. 2 Car. Tindal's case.

note of the fine is not sufficient; but the breach of that covenant ought to be laid after the *Ded. Potest.* sued by the plaintiff. Agreed by Crooke and Yelverton only in court, and upon their advice the action was discontinued without costs. Het. 105. Trin. 4 Car. C. B. Newton v. Sutton.

42. A. covenanted to convey land to J. S. in fee; in action brought for non-performance the defendant pleaded, that J. S. did not shew what manner of conveyance he would have &c. and upon demurrer it was adjudged for the plaintiff. Lat. 126. Pasch. 2 Car. Lucas v. Warren.

43. In debt upon an obligation to perform covenants in an indenture, there was a covenant that the defendant ought to do such an act, thing or things, as the plaintiff or his counsel learned should devise, for the better assurance of certain lands by himself to the plaintiff, and said that a counsellor advised him to have a fine, and upon the declaration there was a demurrer; and upon the opening the case, Crooke and Yelverton being only present, agreed that it ought to have been pleaded, that a writ of covenant was shewn, and the tender of the note of the fine is not sufficient, but the breach of the covenant ought to be laid after the *dedimus potestatem* sued by the plaintiff; and upon their advice the action was discontinued without costs. Het. 105. Trin. 4 Car. C. B. Newton v. Sutton.

44. If a man be bound to another to make such assurance of lands as the obligee shall devise, it is not sufficient for him to devise a fine, and to take out a *dedimus* &c. upon it, and require his consuance in that, for this is but a special way of taking the consuance; but if there were a proviso, that he should not go above 5 miles from his house, then if his house be above five miles from Westminster, he is bound to make his consuance upon the *dedimus*, and that he said has been the difference; per Roll Ch. J. and so he said it had been ruled. All. 69. Trin. 24. Car. B. R.

45. A. promises B. that within such a time after marriage of his son to the daughter of B. A. and his son should be bound *per scriptum suum debita juris forma fiend'*; the breach is laid that they did not give security *per scriptum suum obligatorium*, and adjudged good in B. R. and affirmed in error. Sti. 143. Mich. 24 Car. Tracy v. Poole.

46. Assumption in consideration the plaintiff hath promised to pay the defendant 700 l. for the reversion of a manor, the defendant promised

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promised to seal two instruments for the assurance of it with warranty &c. according to draughts between them before agreed; & licet the defendant tendered him, 1st March, two instruments in writing *secundum translationes præd.* and the 3d March requested him to seal them, yet he hath not sealed them, nor conveyed the reversion of the manor; after verdict for the plaintiff upon non assumpsit it was moved in arrest of judgment, 1st, *That he ought to shew the instruments* to the court that they may judge of them. 2dly, He does not shew, *that he tendered him wax, pen, ink &c.* as he ought. 3dly, *The request is not well made being at another time, not when the tender was.* But judgment was given by all the court for the plaintiff; for, to the 1st, the instruments were agreed before, and therefore need not shew them to the court; to the 2d, There need not be any tender, for the defendant hath taken upon him to make it; to the third, The request after the tender is the better, for so he hath time to read and consider them; and Windham J. said, where conveyances are before agreed, and to be sealed according to such agreement, so that there is no need of counsel, the defendant is to do it at his peril; and where one is to grant a reversion he hath time to do it any time during his life, if it tamdiu continue a reversion, if he be not hastned by request; here is a request, and the conveyances being agreed, there needs no tender. Lev. 44. Mich. 13 Car. 2. C. B. Webb v. Bettel.

47. But if one be to seal a conveyance generally, there the counsel of the purchaser is intended to draw them, and then the purchaser must tender them; per Windham J. quære, for non fuit negatum ab aliquo. Lev. 44. Mich. 13 Car. 2. C. B. Webb v. Bettel.

Or I must shew him, whether I will do it in court or by dedimus.

Vent. 148. per Car. obiter, Trin. 23 Car. 2. B. R.

48. If I am bound to levy a fine I may do it either in court or by commission, but I must go and know of the person to whom I am bound how he will have it, and he must direct me. Mod. 62. pl. 4. Trin. 22 Car. 2. B. R. in case of Turner v. Benny.

Twisden J. said the law is alter'd since Cole & Kinder's case, as to covenants in a conveyance, if they are reasonable, but not that he is seized of an absolute estate in fee simple.

Raym. 191. S. C.—Sid. 467. pl. 3. S. C. Twisden J. inclined according to late books, that reasonable covenants might be inserted, and therefore he would advise; and judgment was given on another point.—See pl. 38.

49. An action of covenant for further assurance, the covenant being to make such conveyance &c. as counsel should advise; they alledge for breach that they *tendered such a conveyance as was advised by counsel*, viz. a lease and release, and set it forth with all the usual covenants; Levins moved, that defendant is not obliged to seal any conveyance with covenants nor with a warranty; besides, that which they have tendered has a warranty not only against the covenantor, but one W. Twisden said, he knew it hath been held, that if a man be bound to make such reasonable assurance, as counsel shall advise, usual covenants may be put in; for the covenant shall be so understood, but there must be no warranty in it, though some have held, that there may be a warranty against himself, but I question whether that will hold; but Weston on the other side said, that the objection as to the warranty was fatal, and he would not make any defence. Mod. 67. pl. 15. Mich. 22 Car. 2. B. R. Laffells v. Catterton.

50. A. covenanted to convey all his lands in B. and a conveyance *tendered was of all his lands in the lordship of B.* and exception was taken thereto; but Twissden J. said he thought they should intend them to be both one. Mod. 67. pl. 15. Mich. 22 Car. 2. B. R. *Laffels v. Catterton.*

Raym. 1908 191. S. C. and the counsel for the plaintiff acknowledged, that it cannot be good, and thereupon judgment was stayed.—Sid. 467. pl. 3. S. C. and because it appeared by the record, that the conveyance tendered comprised more land than he had covenanted to convey; judgment for that reason was given for the defendant.

51. Where A. is bound to convey land to B. but the kind of conveyance is not specified, and the same is to be done by a day certain, and no conveyance is made till the last hour of the last day, and then A. sealed and deliver'd a deed of feoffment, and was ready on the land to deliver seisin to B. but not having given notice to B. that he would execute this charter of feoffment by livery, and B. not being there to take, this was not a performance of the condition; for the charter of feoffment might have been executed by inrollment. Vent. 147. Trin. 23 Car. 2. B. R. *Large v. Cheshire.* [140]

52. But Hale Ch. J. said the time when was not necessary in this case to be in the notice, because the charter was sealed and delivered upon the *extremum day* limited by the agreement, and so the defendant knew it must be on that day; and so for the place, because it is a local thing, and must be done upon the land. Vent. 147. Trin. 23 Car. 2. B. R. in case of *Large v. Cheshire.*

53. Debt upon an obligation, upon condition that the defendant shall well and sufficiently execute, to the satisfaction of the plaintiff's counsel, a release within 7 days. The defendant pleads that the plaintiff did not tender any release; the plaintiff demurs. Hale Ch. J. said that if advice had been necessary, then the plaintiff must have done the first act, but now it is at the peril of the defendant, that the release be to the satisfaction of the plaintiff's counsel; and judgment was given for the plaintiff. Raym. 232. Mich. 25 Car. 2. B. R. *Baker v. Bulstrode.*

Vent. 255. S. C. resolved accordingly.—2 Lev. 95. S. C. adjudg'd.—Mod. 104. pl. 12. S. C. it was objected that the condition was not (to make) but only (to seal and execute, &c.) But per Cur. the word (execute) or the word (seal) comprehends the making.—3 Keb. 277. pl. 12. *Baker v. Betesford* S. C. adjudg'd accordingly.

54. A. covenanted to make such assignment to B. according to an agreement made between them, as counsel should direct and advise. It was objected that the plaintiff's counsel should give the advice, because he was the person interested. But it was answer'd that the defendant likewise had an interest, for it is an advantage to him to make an assignment, so that his covenant might be saved; that 'tis true it had been otherwise if the covenant had been to make such a conveyance as counsel should advise; for then the covenantee may chuse whether he will have a feoffment, release, or confirmation, and then his counsel should advise what sort of conveyance is proper; but here it is to make an assignment, and also such as the parties had agreed upon. Sed adjournatur. 3 Mod. 191. Pasch. 4 Jac. 2. B. R. *Heyward v. Suppie.*

55. An action of covenant was brought upon an indenture of feoffment made by the defendant's wife before marriage of lands lying

lying in *Ilton in the parish of Marsham*, whereby defendant's wife covenanted to make such further reasonable acts for assuring the premises, as by the plaintiff or his counsel should be advised, devised or required, and assigns a breach that plaintiff tender'd a note of a fine to defendants before 2 commissioners appointed for that purpose of lands in the parish of Marsham, and in their presence did request defendants to acknowledge the fine, and then avers that it was a reasonable act for the further assuring the premises, and that defendants refused to acknowledge it. To this the defendants plead, that they had always been ready and willing to acknowledge &c. but that defendant (the baron) was seised in fee in right of his wife of other lands in the parish of Marsham, no part whereof was contained in the deed, and because those lands not contained in the deed were contained in the note of the fine, therefore they refused to acknowledge it. To this plea defendant demurred; and for the plaintiff it was insisted, that tho' there are more acres contained in the note of the fine than in the deed, yet by the covenant for further assurance, defendants were bound to acknowledge it; that it is usual to put in more than the number of acres mentioned in the deed, because as the precise quantity cannot be known, if the party did not put in enough he would lose so much, and it can be no prejudice to defendants, for no more would pass than was contained in the deed, and unless they levy the fine, the feme will have her dower of it, tho' the plaintiff has actually paid a consideration for it; for the defendants it was said, that if the fine proposed would be of any prejudice to defendants, it is a sufficient excuse for their refusing to acknowledge it. Now the deed mentions lands lying in Ilton, in the parish of Marsham, whereas the note of the fine tender'd is of lands in the parish of Marsham; and it is set forth in the plea, and likewise admitted by the demurrer, that defendants have other lands in the parish of Marsham, which would have been comprehended in this fine, which prima facie would enure to the use of the donee, at least it would alter the nature of the wife's estate; for if she was seised in tail, that would be thereby cut off, and the husband might declare the uses, as he thought fit, and she might lose her dower. The court were of opinion for the defendants; for tho' a man is not obliged in a fine to set out the parcels exactly agreeable to the deed, and it is usual to put in rather more, lest in case of a mistake he may lose part of the land, yet here the covenant is to levy a fine of lands in a will, but the note tender'd is of lands in the parish generally; now as defendants have other lands in the parish, and as plaintiffs might have tender'd one not so extensive (for a fine may be levied of lands lying in a vill) it seems a good excuse, and judgment for defendants, unless cause before the end of the term. Pasch. 12 Geo. 2. C. B. Danby v. Gregg & Ux'.

(P. a. 2) As Counsel or Vendee &c. shall advise
&c. Pleadings.

1. IF a man be bound to make sure, sufficient, and lawful estate, *as shall be devised by J. N.* there it suffices to make it as J. N. devises, be it sufficient and sure or not. Br. Conditions, pl. 147. Fitzh. Dette, pl. 81. cites S. C. — 5 Rep. 23. b. cites S. C.

2. A man was bound in 100 l. to make such estate by such a day, as the counsel of the obligee shall devise, and in debt upon the obligation the defendant pleaded *quod consilium non dedit advisamentum*, and need not name the counsellors, because D. pleaded in the negative; but if the plaintiff replies, *quod consilium dedit advisamentum*, he shall say their names; for he pleads in the affirmative. Br. Conditions, pl. 133. cites 6 H. 7. 4.

3. And it is a good plea, that no counsel was given. Ibid.

4. Where a man is bound to make such estate as the counsel of J. N. will devise, and he has 4 of his counsel, but he required the advice of 2 of them only, who give their advice, the other may say, *quod consilium non dedit advisamentum*; for these 2 were all his counsel in this matter; per Townsend and Vavisor. Br. Conditions, pl. 248. cites 11 H. 7. 23. See the year book that Brian is contra, and would distinguish between this and nullum consilium

dedit advisamentum. — Br. Conditions, pl. 133. cites 6 H. 7. 4. per Brian, S. P.

5. But per Brian, if it shall be by the advice of the justices of C. B. there the advice shall be by all; note a diversity. Br. Conditions, pl. 248. cites 11 H. 7. 23. [142] Br. Conditions, pl. 133. cites 6 H. 7. 4. S. P. per Brian.

6. Note per Cur. where a man was bound to make such estate as should be devised by the counsel of the other party, and said he made estate for life of 10 l. Land, as was devised by the counsel of the plaintiff; and by the court it is no plea; for he shall shew what estate the counsel devised, and that he has made it accordingly, and shall shew where the land lies; Quod Nota; for otherwise the issue is not perfect. Br. Conditions, pl. 1. cites 26 H. 8. 1, 2.

7. Bond was conditioned to make such assurance as D. should devise. D. devised two things to be done. Exception was taken that the plaintiff alleged a request of one of them only; sed non allocatur; for the plaintiff may allege breach in the one though the other be performed, and it is in his election which he will demand; and judgment accordingly. Cro. J. 194. pl. 20. Mich. 5 Jac. B. R. Staineroide v. Locock.

(Q. a) *How, and in what manner it shall be performed; and in what not. In respect of the Words.*

[Where the Substance is performed.]

2 Bull. 18. Mich. 10. Jac. S. C. & thereby Williams J. the difference will be where the case arising upon the assumption is in the affirmative, *arg. ol. 126.* [1. D. 8. 9 Eliz. 255. 4. The condition of an obligation was, That he should *suffer his lessee for years to enjoy the land during the term, and that without trouble of him or any other person. A stranger enters by an elder title; per Cur. the condition is not broke, because this word (suffer) is a passive, and all the rest is to be referred thereto, but if any procurement, or occasion of disturbance be by the lessor, his executors or assigns, then he hath forfeited his obligation.* 2 E. 4. 2. b. per Litt. and agreed per Ash. I am obliged that I shall *demise to my son after my decease, land to the value of 20 l. my son is outlaw'd of felony in my life-time, and after I die, I have not forfeited my obligation, (*) and this case was agreed per Cur. 10 Jac. my Reports Gray and Gray, where the principal point was in an action upon the case; the plaintiff declared, in consideration that his testator vellet permittre his land to descend to his son, the defendant assumed to pay him 20 l. and he alleges that he did permit it to descend, not averring that it had descended, yet good per Cur. See such case of a covenant. D. 7 Eliz. 240. 43.]*

and where in the negative, where the same is in the affirmative, there it ought to be averred in fact, that the land did descend; but otherwise it will be, where it is in the negative; for there it is good and sufficient to say, as here in this case, quod non permittit that he did not suffer the land to descend; and herein the whole court agreed, that a good issue may be taken upon this plea of non permittit, that he did not suffer the land to descend; and so by the opinion of the whole court, the action here is well brought, and by the rule of the court judgment was given for the plaintiff.

S. P. For where the defendant in debt by executors demands [2. If the condition be performed in substance it is good, although it differs in words; as where it is to deliver the testament of the testator, if he pleads that he hath delivered *litteras testamentarias*, yet it is good. * 7 E. 4. 3.]

oyer of the testament, the entry upon the continuance is quod querens profert litteras testamentarias: Br. Conditions, pl. 158. cites 17 E. 4. 8. per Littleton & Brian. — So upon obligation to deliver deed of feoffment, it suffices that he deliver *quandam chartam*, &c. this is one and the same substance. [* Roll seems misprinted 7. instead of 17.]

[143] Br. Conditions, pl. 158. cites S. C. & S. P. by Brian. [3. So if the condition is to deliver letters patents, and he loses them, and delivers an exemplification. 17 E. 4. 3.]

Br. Conditions, pl. 158. cites S. C. & S. P. by Brian, of a lease and release, [not saying what lease] quod Littleton negavit; but Brooke says it seems by other books that the law is with Brian, if it be a lease for years and release. Co. Litt. 207. a. S. P. and says it is well performed, because this amounts in law to a feoffment.

[5. If the condition be to grant the reversion of tenant for life or years, and he enters upon the lessee, and makes a feoffment, and the lessee

lessee re-enters, the condition is performed, for the effect is performed. 21 E. 4. 39. b. an opinion contra, and they said it was all one with the principal case there, which was afterwards ruled per Cur. as is here; and so this is a good authority that it is performed.]

[6. If the condition be *to give licence to the obligee to carry trees* that he hath bought of him, or other things, if he gives him licence, yet although a *stranger who hath right thereto disturbs him*, the condition is performed; for it extends but to the person of the obligor by the words. 18 E. 4. 20. b.]

Br. Conditions, pl. 163. cites 18 E. 4. 20. & 20 S. C. & S. P.—

Br. Licence, pl. 13. cites S. C.

[7. But otherwise it had been, if the words had been, *that he should have licence &c.* for this extends to all strangers. 18 E. 4. 20. b.]

Br. Conditions, pl. 163. cites S. C.—

Br. Licence, pl. 13. cites S. C.

[8. If a man covenants *to give licence to J. &c. and he and strangers are bound*, the condition being to perform, or cause the covenants to be performed, the strangers *ought to procure the licence*, otherwise it is broke, although he gives licence. 18 E. 4. 18. b.]

The case was, that A. covenanted by indenture with B. and afterwards

A. and two strangers became bound to B. to perform, or cause to be performed, the covenants in the said indenture. In debt brought against the obligors, they pleaded that they had performed the covenants, &c. But exception being taken to the plea, because two of the defendants were strangers to the covenants, they then shewed that the defendant A. licensed B. the plaintiff to carry, &c. But Littleton and Choke said, that they ought to say that they requested a licence of the defendant, and that he, at their request, licensed the plaintiff as above; for if he of his own will, without any request by them, did licence him, it is no performance of the condition in them two, &c. Br. Conditions, pl. 163. cites S. C. but not as in Roll.

[9. A condition ought to be performed *in substance*; as if the condition be *to withdraw such a suit*, a discontinuance thereof is not a performance, because it differs in substance; for a *retraxit* is a bar in another action, and *not a discontinuance*. 20 E. 4. 8. dub.]

10. In debt it was covenanted *that A. recover certain land, and infeoff thereof B. and shall inroll the deed, and then B. shall pay to him 40 marks, and if he fails, that A. shall pay to B. 40 l.* B. brought debt, and A. pleaded that he had infeoffed him of the land, and after released to him, judgment *fi actio*. And because he did not deny but that he did not recover the land, nor inrol the deed, judgment; per Knivet, this is no matter when you have *accepted a feoffment and release*, by which answer; quod nota; quare of his opinion. Br. Conditions, pl. 76. cites 39 E. 3. 5.

11. If the defendant be *bound to make recognizance of 20 l. by a day and he pays the 20 l. at the day, and does not make the recognizance*, it suffices; per Culpeper, which the court denied. Br. Conditions, pl. 41. cites 12 H. 4. 23.

12. And per Hank, if a man be bound *to infeoff another of the manner of D. and he infeoffs him of the manner of S. which is of greater value*, the condition is not performed. Ibid.

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13. Debt upon obligation, the condition was that if *J. F. & omnes alii si qui fuerint feoffati dicti J. F. ad suum usum de Manerio de B. release totum jus suum T. F. filio dicti J. F. and deliver the release to the plaintiff to the use of the said T. F. citra tale festum, quod tunc &c.* and he said that at the time consecutionis obligationis, there were not any feoffees, but *J. F.* was sole seised, which *J. F.* has released before the day, and delivered it to the plaintiff to the use of the said *T. F.* judgment; and did not answer if there were any feoffees in time passed, but in the present time; and by the best opinion, this word (*fuerint*) in this case shall be taken for the present time, and so the plea good; but per Prisot and divers others, it shall be taken for the *preter tense*, therefore quære, because it is not adjudged. He may have feoffees who were disseised before, who ought to release. Br. Conditions, pl. 17. cites 35 H. 6. 11. 15.

14. But it was agreed that *dedi & concessi* in deed of feoffment is taken for the present tense. Ibid.

15. And it was agreed that if a man gives all his pikes in such a pond, or all his goods *si quæ fuerint*, this shall be taken for the present tense, and for such pikes or goods as he then had; but the cases are not alike, per Prisot and others. Ibid.

16. If a man be bound to suffer *J. N.* to recover in formedon brought; there if *J. N.* be nonsuited, and brings other formedon, the obligor is not bound to suffer it there; for formedon brought is the formedon which was pending at the time of the obligation made. Br. Conditions, pl. 223. cites 21 E. 4. 52, 53.

17. In debt, *P. B.* was bound to make estate of 40 l. land per ann. to a certain person, to the intent that if *R.* son of the said *P. B.* died, living *P.* the father, that then the feoffee infeoff the feme of the said *R.* and after *P.* died, and *R.* and his feme survived; and per Danvers, Brian, and Fineux, the condition is well performed, because the intent is observed, viz. that the feme of *R.* should be infeoff'd if *R.* died in the life of *P.* his father, and now *R.* did not die in the life of *P.* but survived him, and therefore the bond is saved; quære inde; for contra Rede and Vavisor. Br. Conditions, pl. 136. cites 9 H. 7. 17.

D, 14. b.
pl. 72 & 18.
pl. 104 S. C.
adjudged for
the defend-
ant accord-
ingly.

18. Debt upon bond conditioned, that if *J. M.* should die before Christmas 1532, without issue male of her body by *R. B.* begotten, be then living, then the bond to be void; the defendant pleaded in bar, that after the said bond, and before the said feast, *J. M.* did die without issue male of her body then living; the plaintiff replied that *J. M.* had issue *H.* and that before Christmas &c. she died, the said *H.* then living, who likewise died before Christmas; and upon a demurrer it was adjudged that the plea in bar was good, and the replication ill, the question being, whether the words (then living) should relate to the death of *J.* or to Christmas? And. 1. pl. 1. Pasch. 26 & 27 H. 8. Bold v. Molineux.

19. If a man leases land upon condition that the lessee shall rake the ditches, and does not say how often, there if he rakes them once he has performed his condition and covenant; quod nota. Br. Exposition, pl. 2. cites 27 H. 8. 6. per Fitzh.

Condition.

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20. Condition to pay 15 l. at Michaelmas, and 15 l. at Lady-day, and so from thenceforth yearly during the life of R. H. or until the defendant shall lawfully advance one L. H. to some benefice, &c. The bishop preferred L. H. before Michaelmas next after the making of the bond, yet held, that the two first payments ought to be made notwithstanding. 2 And. 65. pl. 47. Mich. 2 and 3 P. & M. Cro. E. 549. pl. 23. 39 Eliz. C. B. the S. C. but is stated to pay 15 l. at Mich. 15 l. at Lady-day; and defendant

pleaded, that L. H. was presented to a benefice before the first feast of St. Mich. and adjudged no plea, for the 15 l. is to be paid notwithstanding; because the limitation (until he be advanced) goes only to the subsequent payments.—Noy 64, 65. S. C. adjudged accordingly; for the two first feasts are absolute.

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21. Except construed to signify saving in a condition. Mo. 113, 114. pl. 254. Pasch. 20. Eliz.

22. L. bargains and sells a manor, and covenants to acquit, or otherwise save it harmless from all former bargains, sales, incumbrances &c. made by any person, except the estate of M. and such estates as she has made which will determine by her death. M. after grants part of the manor for three lives by copy of court-roll; M. dies. The court held, that this grant by copy made after the bargain and sale cannot be called a former incumbrance; and though it does not determine by the death of M. according to the intent of the exception, it is not within the intent of the words (former grants) and the exception is added only to qualify the covenant, and therefore shall not be expounded so as to extend it further than the words; but a grant by copy is an incumbrance. Sav. 74. pl. 154. Mich. 26 & 27 Eliz. Lovel v. Luttrell.

23. Feoffment to the use of B. in tail, provided, that if the said B. do go about to avoid any estate or demise by copy made, or to be made of the premises, or any part thereof, that then his estate shall cease. B. entered and levied a fine sur conuſance de droit come ceo &c. of the land; per cur. 'tis no offence against the proviso, for the words (made or to be made) do not extend to estates made or limited by the said feoffment, but only to estates before made and to be made afterwards. Le. 207. pl. 288. Mich. 32 & 33 Eliz. C. B. Bradstock's case.

24. A. enfeoffs B. upon condition, that B. shall make an estate in frank-marriage to C. with M. daughter of A.; in this case B. cannot make an estate in frank-marriage, because the estate must move from the feoffee, and the daughter is not of his blood, but yet he must make an estate to them for their lives, for this is as near the condition as he can; so 'tis if the condition be to make to A. (which is a meer layman) an estate in frank-marriage, yet must he make an estate to him for his life. Co. Litt. 219. b.

25. A diversity is to be understood between conditions that are to create or to destroy an estate, for a condition that is to create an estate is to be performed by construction of law as near the condition as may be, and according to the intent and meaning of the condition, though the letter and words of the condition cannot be performed; but otherwise 'tis of a condition that destroys an estate, for that is to be taken strictly, unless it be in some certain cases. Co. Litt. 219. b.

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M

26. Debe

26. Debt on *bond* with condition *to give and grant to A. his heirs* and assigns. Defendant pleads he has been ready to give and grant, adjudged ill; for he must plead that he did it, otherwise had it been, if the words had been, *as counsel should devise*. Brownl. 75. Trin. 17. Jac. Chapman v. Pescod.

Once discharged are gone for ever, per Coke Ch. J.

27. Conditions are *stricti juris*. Litt. R. 128, 129. per Vernon J. Mich. 4. Car.—Especially when they are to defeat estates. Arg. Roll. R. 70. Mich. 12 Jac. in case of Whitchcock v. Fox.

2 Buls. 292. S. C.—Where general conditions tend to the benefit of the party they shall be construed generally; as a condition not to alien, but to his wife for her life, and for the residue of the term to one of his children. This condition shall be extended to any after-wife as well as to the present, because for his benefit; but where it is to the prejudice of the party it shall be construed strictly. Arg. 2 Buls. 290. cites 39 H. 6. 9.

[146] 28. Lease by baron and feme and another feme; lessee covenants by the same indenture *to find sufficient man's and horse meat to the baron and feme, and to the other feme, or to their servants, at their coming to London, at his house at Southwark; baron and feme die. The other feme takes husband. Per Cur. he is not bound to find sustenance for the husband, but only for the wife or for her servants, and not for both at one and the same time, because the covenant was in the disjunctive; but it was doubted if he shall find them victuals for one meal only at their coming, or for all the time of their staying there.* Het. 53. Mich. 3 Car. C. B. Grange & Ux. v. Dixon.

29. In debt upon bond the defendant prayed oyer of the condition, which was *59 l. upon the birth of his first child by his wife, or any other woman, and averred that he had no child by his wife; the plaintiff replied, that he had a child by another woman.* Upon demurrer the court held, that it must be intended of a child by another wife, and not otherwise; and judgment for the defendant. Comb. 37. Mich. 2 Jac. 2. B. R. Creswell v. Trott.

30. A condition *to pay money when able* is to pay it presently; for the law supposes every man ought to pay what he is able to pay. Cumb. 445. Anon. at the sittings before Holt Ch. J. 21 June 1697.

31. Condition is to be construed *from the intent of the parties.* 1 Salk. 171. pl. 3. per Holt Ch. J. Pasch. 13 W. 3. B. R.

32. In debt upon obligation the defendant, upon oyer of the obligation and condition, which was *for payment of such a sum on or before such a day, pleaded payment at a day before the day mentioned in the condition.* The plaintiff traversed the payment, and concluded to the country, to which the defendant demurred. It was said for defendant, that the traverse was immaterial, for if issue had been joined upon it, and found for the plaintiff, it would not have determined the right of the cause, and the case of Holmes and Brockett, Cro. J. 434. was cited; but per tot. Cur. the traverse is good, because the payment pleaded is according to the condition, which gives the defendant a power to defeat the obligation by payment on any day before the day expressed, and judgment was pro Quer. MS. Rep. Trin. 12 Annæ, C. B. Furness v. Killum.

• (R. a) How

(R. a) How it shall be performed. The Intent ought to be performed.

[1. IF a sheriff arrests a man upon a latitat, at the suit of J. S. Note, that
issuing out of B. R. and lets him to bail, and takes an obliga- it was en-
tion for his appearance, of which the condition is, that if he appears acted by
in B. R. such a day the next term, that then the obligation shall be parliament,
void; and the obligor appears at a day in the same term, before the that if J. N.
day mentioned in the condition, at the suit of another man, which does not come
is an appearance in law for all suits which shall be commenced before the
against him the same term, yet because this is an appearance by justices of
fiction in law, and not an actual appearance at the day, the con- B. R. within
dition is broke; for, perhaps, if he had actually appeared, special one quarter
bail would have been required. Pasch. 15 Jac. B. R. Sir Richard of a year,
Buller's case, per Curiam.] that he shall
be condemn'd
in 4. l. and
be appear'd
before the
king him-
self, and therefore was condemn'd; for he ought to have appear'd before the justices sitting in court,
and not before them out of the court, nor before the king himself; Quod nota quia conditio stricta.
Br. Conditions, pl. 208. cites 8 H. 4. 6.

[2. If A. and B. submit themselves to the award of J. S. of all Br. Condi-
actions &c. and A. hath an action depending against B. of which there tions, pl.
is a continuation de termino Paschæ usque ad terminum Trinitatis, and 173. cites
the submission and award are (*) made between Pasch. and [OEtab.] * Fol. 427.
Trinitatis, and the award is, that he shall retract his said suit, and S. C. and
after A. at Trinity term does not further pursue his action, but says that so
suffers it to be discontinued, that is a good performance of the award; A. alledged
for the intent of the arbitrator was not that he should make a legal a disconti-
retraxit, but that he should not prosecute the suit further. 21 Ed. nuance for
4. 38. adjudged.] a retraxit,
and that the

plea was adjudg'd not good; for non suit nor discontinuance is not a retraxit; because
the party shall be barr'd, whereas in the other case he may commence his suit de novo, and afterwards
the judgment was affirmed.—Cro. J. 525. pl. 12. Hill. 16 Jac. B. R. Gray v. Gray. It was
agreed that the award being that he should not prosecute in such an action in the same term that the
entry of continuance from term to term is not any breach.

[3. If the condition of an obligation be to stand to the award of Le. 32c. pl.
J. S. who awards that he shall pay 20 l. to the obligee, and he pays 45c. S. C.
it to the wife of the obligee, and she accepts it, yet this is not any adjudged,
performance without alledging more. Hil. 32 Eliz. B. R. between plaintiff. for the
Froud and Batte adjudged.]

[4. If a lessor covenants with his lessee for years, that it shall be Cro. P. 544.
lawful for the lessee peaceably &c. to enjoy the land, and after the pl. 15. Co-
lessor enters tortiously upon the lessee, and ousts him, yet this is a rus's case.
breach of the covenant; for the intent was, that he should enjoy it adju'd for
without the interruption of the lessor. H. 39. B. R. Core's case the plaintiff
adjudged.] without ar-
gument.
— ec
(17. 1) pl.
11. S. C.

Cro. E. 128. [5. If a man *leases a house and land*, upon condition that the
 pl. 57. Mich. lessee *shall not parcel out the land, nor any part thereof, from the house,*
 38 & 39 and after the lessee *leases the house and part of the land to A. and*
 Eliz. C. B. after *leases the residue of the land to C.* this is a breach of the con-
 Marsh. v. dition; for by the word (*parcelling*) is intended a division or
 Curtis S. C. separation of the land from the house, and if the first grant be not a
 and 3 judges forfeiture, the second is. Hill. 41 Eliz. B. R. between *Curtis*
 agreed clearly that the condition *and Marsh* adjudged in a writ of error.]
 was broken,
 and that it is all one where the house is divided from the land, and where the land is divided from the
 house, and it is a breach both within the intent and the words; but Owen absent adjournatur, and
 afterwards it was adjudg'd for the plaintiff. — 2 And. 42. pl. 38. S. C. in C. B. held according-
 ly. — Ib'd. 90. pl. 54. S. C. & S. P. held accordingly. Mo. 425. pl. 594. S. C. in C. B. and S. P.
 held by all the justices accordingly.

Cro. E. 833. [6. If a man makes a *feoffment in fee to B. of all his land, and*
 pl. 8. Lane *after bargains and sells the same lands to him* for further assurance,
 v. Hodges, and after the feoffor *covenants with the feoffee to make such further*
 S. C. the *assurance of all such lands that he hath bargained and sold to him, as*
 bargainor the counsel of the feoffee shall devise, and binds him to perform the
 in feoff'd the bargainee covenants; and after the counsel *devises, that he shall suffer a com-*
 of all his *mon recovery*, he is bound to perform it; for though he covenanted
 lands in U. to make an assurance of all lands that he had bargained and sold,
 and after- and he hath not bargained and sold any land, for the *bargain and*
 wards by in- *sale was void, being made after the feoffment*, and so on bargain
 denture bar- *omnino in strict exposition of law*; yet it is a bargain * and sale in
 gains and *appellation to which the covenant shall have reference.* P. 43 Eliz.
 sells to the B. R. between *Hodges and Lane* adjudged.]
 obligee all
 his lands in
 U. and co-
 venants to
 make further assurance of all his lands. The breach assigned was in not making further assurance of
 those lands, but by the feoffment prior he had not any lands there at the time of the bargain and sale,
 and consequently the breach is not well assigned, and so held all the court. But if one in feoffs another of
 his lands [generally] and afterwards bargains and sells them by name, and covenants to make further
 assurance, he must make assurance accordingly, wherefore they were of opinion to reverse the judgment,
 but the matter was referred to compromise.

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[7. If a lessee of an house *covenants not to lease the shop, yard, or*
other thing belonging to the house, to one who sells coals, nor that he
himself will sell coals there, and after he leases all the house to one
who sells coals, he hath broke the condition. M. 8 Jac. B. R. be-
 tween *Chinsley and Bonner* plaintiff, and *Langly* defendant, adjudged,
 for he hath broke the intent.]

8. If a lease be made on condition that *if the lessee be disposed to*
sell the term, the lessor shall have the first offer or advancement, he
giving therefore as much as another will give. If the lessee, being
 disposed to sell the term, a stranger offers him 100 l. for it, *he need*
not tell the lessor how much is offer'd, but ask him generally if he will
give so much for it as another will, and if he says No, he need
 say no more to him, but if he says Yes, then he ought to *show certainly*
what the other will give more, &c. Per Shelley, D. 13. b. 14. a. pl.
 65. 68. Trin. 28 H. 8. Anon.

9. And if the lessor, when he is ask'd the question, *answers that*
he will take time to consider of it, the lessee is not obliged to wait so long;
 for it may be another will give him 100 l. immediately, and it is
 not

not reasonable to defer the sale, but the lessor must say Yes or No presently, and so the condition is then determined, &c. Per Shelley and Fitzherbert, *D.* 14. a. pl. 68. Trin. 28 H. 8. Anon.

10. In every condition a reasonable intention shall be construed, though the words sound to a contrary meaning; as if I grant to B. an annuity till B. has purchased 5 s. rent, and B. purchases 5 s. rent joint'y with J. S. this is no performance; for my intent was, that B. should purchase to his own profit and advancement only. *D.* 15. pl. 79. Trin. 28 H. 8.

11. A condition was to purchase 5 s. rent to J. S. and his heirs; S. P. Br. A. has 5 s. rent issuing out of J. S.'s lands. A release of all his right in the land is performance of the intent of the condition. *D.* 15. pl. 80. Trin. 21 H. 8.

12. An obligation was conditioned to deliver the plaintiff an obligation, in which he was bound to the defendant before such a day. The defendant sues the plaintiff upon that obligation, and recovers, and afterwards and before the day he delivers the obligation to him. Wray and the other justices held this to be no performance, for the intent was that he should have the obligation for his discharge, which is not by the delivery of it at the day, for it is transferred in rem judicatam; and notwithstanding the delivery of the bond, yet he may have benefit of the judgment. *Cro. E.* 7. pl. 3. Trin. 24 Eliz. B. R. Treat's case.

but at the day appointed he tender'd the statute to be cancelled. Resolved that this was a breach, for after execution he cannot deliver up the statute to be cancell'd in the same plight as it was at the time of the covenant; for as Twissden J. said, this would be to keep the kernel and deliver the shell. *Sid.* 48. pl. 7. Mich. 13 Car. 2. Robinson v. Aunts.—*Raym.* 25. Robinson v. Ampe. S. C. adjudg'd for the plaintiff, nisi, &c.—*Keb.* 103. pl. 198. S. C. adjournatur.—*Ibid.* 118. pl. 24. and judgment nisi.—*Gouldsb.* 177. in pl. 111. S. P. cited Arg. to have been adjudged accordingly.

13. If a man covenants that his son, then within age, & infra annis nubiles before such a day shall marry the daughter of J. S. and he does marry her accordingly, and after at the age of consent he disagrees to the marriage, yet is the covenant performed; for it is a marriage, and such a one as the covenantee would have, untill the disagreement. *Ow.* 25. 29 Eliz. Fenner's case.

14. If A. is bound to B. that J. S. (who in truth is an infant) shall levy a fine before such a day, which is done accordingly, and afterwards the same is reversed by error, yet the condition is performed notwithstanding. *Arg. Le.* 54. at the end of pl. 67. Pasch. 29 Eliz. C. B.

15. A bond was condition'd to plead an issuable plea in 7 days. An issuable plea was pleaded and drawn in paper, but not entred of record, and therefore the court (absente Anderson) held the obligation forfeited. *Gouldsb.* 50. pl. 11. Pasch. 29 Eliz. Drury's case.

16. A. makes a feoffment in fee to B. upon condition, that if A. within a year after the death of B. shall pay 100 l. to the heirs or executors of B. that A. may re-enter; B. makes a feoffment of this land to C. and B. makes his testament, and makes his wife and his heir his executors, and dies; A. within a year after the death of B. by agreement with the heir of B. at a time and place limited for the

ment had been sufficient to defeat the estate; for the heir of B. might prejudice himself, and one executor

payment, *pays the 100l. to him; and by the said agreement, A. is immediately to have back 30l. of this 100l. and all is done accordingly; the entry of A. upon C. is not congeable; so adjudged and affirmed in error; for this colourable payment is not a payment of the 100l. but of 70l. only; and the law will not allow such fictions and colours to the prejudice of a 3d person.* Jenk. 261. pl. 61. 39 Eliz. Goodale's case.

may prejudice the other; for they represent one person; but an executor cannot prejudice a 3d person. Ibid. 262. S. C. 5 Rep. 95. b. S. C. and S. P. adjudg'd. Cro. E. 387. pl. 4. Goodale v. Wy t. S. C. adjudg'd and affirm'd in error. Mo. 7c8. pl. 989. S. C. adjudg'd and affirm'd in error. Poph. 99. pl. 2. S. C. Gouldsb. 176. pl. 111. S. C. adjudg'd. Cu. Litt. 209. b. S. C. & J. P. S. C. cited by Hobart Ch. J. Goob. 299.

17. The defendant *leased lands to the plaintiff for 6 years, and covenanted that he should enjoy it during the term quietly and without interruption, and discharged from tithes and other duties, and if the tithes were demanded and recovered against him during the term, he should retain in his hands so much of the rent as the tithes amount to, and shewed that 42 Eliz. the parson sued him for tithes there growing 29 Eliz.* All the court held that the suit, though after the determination of the term, was a breach of the covenant, for he did not enjoy it discharged within the intent of the covenant; but because it was not alleged that the suit was lawful, or that the tithes were due, for he was not bound to discharge him but from illegal suits, and so the breach was not well assigned, it was adjudged for the defendant. Cro. E. 916. pl. 7. Hill. 45 Eliz. B. R. Lanning v. Lovering.

Cro. E. 27. 18. Debt on a bond conditioned, *that the wife should make a will* pl. 9. Paich. &c. The defendant pleaded that his wife did not make a will; the jury found that *she made a will*, and that she was a feme covert at the time of making it; adjudg'd that though it is not properly a will, she being a feme covert, yet it is a will within the intent of condition, and good. Cro. C. 219. pl. 5. Trin. 7 Car. B. R. Marriot v. Kinsman.

19. Condition by the husband, that if his wife *die without issue within two years*, to repay 500l. of her portion. The wife *has issue, and she and her children die within two years*, the baron shall not repay; for the having issue was performance of the condition. Sid. 102. pl. 8. Windham J. cited it as the case of Bret v. Pil-dredge.

20. A. was bound to pay at Mich. in Gray's-Inn Hall, to B. 50l. (*not saying 50l. in money.*) A. at Mich. when the gentlemen were at supper, came and tendered 50l. weight of stone; but adjudged no tender; cited by Twifden as a case which he remembered. Sid. 151. in pl. 19. Trin. 15 Car. 2. B. R.

[150] 21. Defendant covenanted, *that the plaintiff should have the 7th part of all grains made in the defendant's brewhouse for 7 years, and the plaintiff assigns a breach, that the defendant did put divers quantities of hops into the malt, by reason whereof the grains were spoiled;* adjudged for the plaintiff; because in all contracts the intention of the parties is to be considered, and it was the intent of the parties well assign'd; here, that the plaintiff should have the grains for the use of his

cattle, which they will not eat when the hops are put into them. ^{for the intent of the covenant was that the} Raym. 464. Pasch. 34 Car. 2. B. R. Griffith v. Goodhand. ^{grains should be delivered without corrupt mixture. which might render them unserviceable, and by such fraudulent mixture he had disabled himself to perform the intent of the agreement, and thereby broken his covenant, and judgment per tot. Cur. for the plaintiff. The chief J. before whom the cause was tried, affirmed that it appear'd upon the evidence that the defendant had made the mixture with a design to dissolve the agreement, that price of grains being much enhanced by the drought of the season.——Skinn. 39. Anon. S. C. held a breach of covenant.}

22. Debt upon bond conditioned, *that the husband should leave his wife 80 l. at his death, so that she might peaceably enjoy it to her own use.* The husband died. The defendant who was administrator to the husband pleaded, that he made his wife executrix, and left goods and chattels to the value of 100 l. and devised, that she should pay herself. This plea was adjudged ill, because he might owe debts of a higher nature, as on judgments, or statutes, so that she could not pay herself, and perhaps his estate was so litigious, that it is better for her to renounce the executorship, (as she had actually done) and sue the administrator. 3 Lev. 218. Trin. 1 Jac. 2. C. B. Thomason v. Wood. ^{3 Salk. 65. pl. 9. Thompson v. Wood, S. C.}

(R. a. 2) Where it must be effectual.

1. IF A. is bound to *acknowledge a statute*, and he doth acknowledge the same, but *keeps it in his own hands*, this is no performance; per Fenner J. Goldsby. 156. cites 20 E. 3. Accompt.

2. Note, it was held, that where a man is bound in recognizance to *keep the peace and to appear* *Mense Paschæ*, and he appears, but his appearance is not of record, he has not performed the condition. Br. Conditions, pl. 94. cites 38 H. 6. 17.

3. So if a man be bound in an obligation, upon arrest by the sheriff, to *appear such a day before the justices of Banco*; there if he appears, and his appearance is not entred of record, he has forfeited his obligation, quod nota. Ibid. ^{S. P. by Rhodes, J. Goldsb. 50. pl. 11.}

4. If a man be bound to *demise or relinquish to his son 10 l. land per annum*, and the son is *outlawed of felony in the life of the father*, and the father dies *seised of the 10 l. land*; the bond is not forfeited, for this shall descend, though the lord may take *the escheat*. Br. Conditions, pl. 140. cites 2 E. 4. 2. per Ashton and Littleton.

5. In debt, where a man is bound to *appear at a certain day upon writ*, he ought to appear, and to have *special entry of his appearance*, though the writ be not returned; and it is a good plea that the bailiff to whom he is bound kept him in person till the day of his appearance was passed. Br. Conditions, pl. 75. cites 9. E. 4. 23. [151]

6. Where a man is bound to *appear in bank upon capias such a day*, he ought to appear at the day, and have his appearance recorded, though the sheriff does not return the writ; and yet he has not day in court. Br. Conditions, pl. 162. cites 18 E. 4. 17. ^{S. P. And it is no plea for the defendant, that it does not appear of record that}

any such writ was returned. Br. Dette. pl. 167. cites S. C.

7. Condition of a bond was, that the obligor *shall licence* the obligee for 7 years to carry wood &c. If the obligor *gives licence, and afterwards revokes it, or disturbs the obligee*, the obligation is forfeited. 8 Rep. 83. 2. cites 21 E. 4. 55. a per Choke and 18 E. 4. 18. b. & 20. a

S. P. by Holt. Ch. J. 8. A. gave bond to B. *to deliver up another bond before Michaelmas, wherein B. was bound; afterwards A. sued B. on the bond, and had judgment and execution before Michaelmas, and afterwards at Michaelmas A. delivered the bond.* Adjudged no performance, for it ought to be delivered in such plight as it was at the making the second bond. Mo. 709. in pl. 989. cites Mich. 21 & 22 Eliz. B. R. Brown v. Randal.

9. Debt by B. against S. upon bond, conditioned, that S. the obligor *should procure the next avoidance of the archdeaconry of &c. so as B. the obligee might present.* S. did procure a grant of the next avoidance, but before it happened, the present archdeacon was made a bishop, so that now the queen had a right to present; resolved, that the condition was not performed, and judgment for the plaintiff. 4 Leon. 61. pl. 155. Hill. 29 Eliz. C. B. Bingham v. Squire.

10. If A. is bound to present B. and he presents him by *simony*, yet the bond is forfeited; per Hobart. Noy 25. in case of Winchcomb v. Pulleston.

11. King H. 8. granted lands to A. and his heirs, *provided that he and they, perpetuis futuris temporibus invenirent & sustinerent duos capellanos in ecclesiæ parochiali de W. ad orandum pro animabus H. 8. his heirs and successors, & ad celebranda divina servitia, & curam animarum parochianorum; A. conveyed the lands to B. and his heirs upon the same conditions, who appointed two chaplains, one of whom was never resident there and did not perform his duty.* Adjudged by all the barons, that this was a breach of the condition. See Litt. Rep. 94 to 97, and 105 to 112, &c. the arguments of the counsel, and 129 to 139 the arguments of the barons. Trin. & Mich. 4 Car. in the exchequer. The King v. Brockham.

12. An award *to enter into a bond* to another, it is not enough for the party to bring a bond written, and to say, *I will seal and deliver to you this bond; but he must bring the writing with a seal clapped upon it, and say, I deliver you this as my act and deed; and if he omits the doing of any one thing that is essentially necessary to the executing the deed, he has not performed the award; per Holt, Ch. J. 12 Mod. 533. Trin. 13 W. 3. in case of Lancashire v. Killingworth.*

(§. 2) What shall be said a Performance, and what a Forfeiture.

[1. IF the condition of a feoffment be to *infeoff J. S. if he infeoff J. S. and two others*, this is no good performance, but the condition is broke. 21 Aff. 28.]

Br. Conditions, pl. 207. cites S. C. and says that

therefore the feoffor enter'd for condition broken, and J. S. ousted him, whereupon the feoffor brought assise and recover'd. And Brooke says, Et sic vide, that he ought not to infeoff more than contain'd in the condition.—Br. Conditions, pl. 90. cites 36 H. 6. 8. S. P. by Billing.—An annuity is granted until the grantee purchases 5s. of rent, and he purchases 5s. rent jointly with another, this is no performance of the condition; but if a condition is that if I purchase a rent of 5s. Habend' & Percipiend' to me and my heirs, and a stranger having a rent of 5s. issuing out of my land, releases this to me and my heirs; the condition is performed. Dy. 15. pl. 72, 80. Trin. 28 H. 8.

[2. If the condition be, that whereas B. hath bound himself apprentice to the obligee [obligor] for seven years, if the obligor *retain, keep, and employ the said apprentice in his own house and service, in the art of surgery, during the term*, the obligation shall be void; and after the obligee [obligor] *sends the apprentice in a voyage to the East Indies*, in the company of others expert surgeons, *the better to learn the said art*, this is a breach of the condition; tho' by the condition he is not restrained from sending his apprentice into other places about his cures, yet he ought (*) always to be of his household, going and returning, and in his service, and not put over to any other; for the putting an apprentice to another, is a great trust for his diet, health, and safety; and generally a man cannot compel his apprentice to go out of the realm, if it be not expressly agreed, or the nature of the apprenticeship imports it, as if he be bound apprentice to a merchant-adventurer, or sailor. Hobart's Reports 181. between *Coventre and Woodhall* adjudged.]

Hob. 134. pl. 180. Hill. 13 Jac. S. C. —Brownl. 67. Coventry v. Windal S. C. adjudged. —See (U. b) pl. 428. 1, 2, 3. S. C. by the name of Coventry v. Boswell.

[3. If a man seised in fee of lands, leases it for years, and the lessee covenants to render the possession to the lessor, his heirs, and assigns, at the end of the term upon request; and after the lessor assigns over the reversion to two, and one of them, at the end of the term, comes to the lessee, and demands the deliverance of the possession, though the other never demanded the possession, yet by this demand, by one only, he is bound to render the possession, otherwise he hath forfeited his covenant; for the demand of one joint-tenant is sufficient for both. Pasch. 16 Jac. B. R. between *Linghen and Payn* adjudged.]

Cro. J. 475. pl. 8. Hingen v. Payn, S. C. adjudged for the plaintiff. —Bridgm. 128. S. C. adjudg'd per tot Cur. for the plaintiff. —Godb. 272. pl. 381.

Ingin v. Payn, S. C. adjudged.

4. If A. be bound to *infeoff me*, it is no plea that he has infeoffed J. S. by my command, for I have no action to recover it from him; but if he be bound to *pay me 10 l. payment to J. S. by my command is a good plea*, because I may have debt or accmpt against him; per Wangford, to which Billing agreed. Br. Conditions, pl. 90. cites 36 H. 6. 8.

5. Annuity

5. Annuity granted *quandiu* the grantee should be friendly and obliging to the grantor, there if the grantee *labours to put the grantor out of service*, this is forfeiture of the annuity. Br. Conditions, pl. 148. cites 7 E. 4. 16.

[153]

6. Condition of a recognizance taken before the mayor of London was, *to deliver quiet possession* at the end of a term to the mayor to the use of J. S. &c. The key was delivered to the mayor, the house empty and the doors locked; but within an hour after a person claiming right to the house, and whom the obligor was supposed to favour, entred the house at a shop door by a key he had kept a long time; whether this was a performance dubitatur. See D. 219. pl. 9. Mich. 3 & 4 Eliz. Parry v. Smith.

Le. 298. pl.

409. E. C.

adjudged,

that the

condition

was broken

for where

the devifor

had allowed

the devifor

to difcon-

tinue for life

to make a

jointure to

his wife;

now he has

exceeded his

allowance,

for he himfelf

might have

made a jointure

to his wife

indefeifable

by fine upon

a grant upon

a render for

life, &c. But

this fine with

the proclamations

is a bar to the

former entail

which was created

by the devife,

and has created

a new entail,

and the former

tail was barred

by the fine againft

the intent of the

devifor; alfo

by this fine he

has created a new

remainder, fo

as his iffue,

inheritable to

this new entail,

might alien and

be unpunifhed,

which was

againft the meaning

of the devifor.

7. A. feifed of lands in fee his iffue two fons, and devifed to his youngeft fon certain lands in tail, remainder to his firft fon on condition *not to alien or difcontinue*, but for jointure to his wife or wives, and only for life or lives of fuch wife or wives. Devifee *levies a fine* to a ftranger, and by deed declares the ufe to himfelf and his wife and to the heirs male of his own body, remainder to the heirs of his father, and avers that this fine was for jointure of his wife; adjudged that the levying the fine is a breach of the condition. Mo. 212. pl. 353. Mich. 27 & 28 Eliz. Rudhall v. Milward.

Obligation

was condi-

tioned, that

if J. S.

makes an

obligation to

the plaintiff

before Michaelmas,

that then, &c.

the defendant

pleaded that

J. S.

made the obligation,

and fealed and

delivered it to

another as his

deed to the

ufe of the plaintiff;

and it was

adjudged, that

it was no performance

of the condition,

for the meaning

was, that it

should be a

good deed to

the plaintiff,

and perhaps the

other will not

deliver it to

the plaintiff. Cro. E. 143. pl.

9. Trin. 31

Eliz. C. B.

Peafe v. Draiton.

8. If a covenant be *to make an eftate to A. and it is made to B. to the ufe of A.* Periam J. faid he doubted if it was good or not. Godb. 95. in pl. 106. Mich. 28 & 29 Eliz. C. B.

9. Debt on *bond* with condition *to give and grant to A. his heirs* and assigns, defendant pleads he has been ready to give and grant; adjudged ill, for he muft plead that he did it; otherwife had it been if the words had been *as counfel fhould advife*. Brownl. 75. Trin.

11. Jac. Chapman v. Pefcod.

10. A man makes a *feoffment of lands in five counties, with a condition of re-affurance*. A *re-affurance* is made of lands in four counties; it is a breach of the condition but only for the lands in one county, and a good performance for the other; refolved by Hobart Ch. J. Coke Ch. J. and Lord C. Egerton. Mo. 823. pl. 112. 14 Jac. in Canc. the King v. Howard.

11. Condition that a *conveyance* fhall be to A. B. and C. to the ufe of D. and the heirs male of his body, the remainder *to the heirs male of E.* The limiting the remainder to E. and the heirs male

of

of his body is no performance, for they agree not to the words of the condition. Het. 177. Trin. 7 Car. C. B. Stone v. Tilderley.

12. Debt sur obligation, the condition whereof was, *to leave and bequeath unto the obligee, the third part of the estate &c.* the obligor joins him with two others as executors; the obligee dies intestate. The administrator of the obligee brings an action on that bond; the question was, whether that were a performance of the condition. 2 Show. 69. pl. 54. Trin. 31 Car. 2. B. R. Impey v. Pitt. 2 Jo. 133, 134 Impey v. Pitt. S. C. it was insisted, that an express devise is necessary to answer to the condition, and legacies may be given by the will; and if not the defendant ought to shew it. The court inclined for the plaintiff; sed advise vult.

13. Two men and their wives join in a grant of their wives' lands being parceners, *and covenant, that they and their wives have good right to convey the lands and to make further assurance; it was assigned for breach that one of the women was under age and died, and that the right of the lands descended to her son an infant, and so the estate of a moiety divested out of the plaintiff. This was held a breach and judgment for the plaintiff, nisi.* 2 Jo. 195. Pasch. 34 Car. 2. B. R. Nash v. Aston. [154] Skinn. 42. pl. 3. S. C. and S. P. agreed per Cur.

(T. a) What shall be said a Performance.

[1. IF a man leases for life, upon condition that the lessee shall not *do any waste*, and after the lessee suffers the house to fall for want of covering and reparation, which is not any act of doing, but a *permission*, yet it seems that the condition is broke, for the words are, any waste, and such waste is within statute of Gloucester, which speaks of doing of waste; and it seems that the permission of the house to fall may properly be said a doing of waste, which is a collateral thing, which is but as much as if he had said, if he had disinherited him. D. 11 Eliz. 281. 21. but quære.] Where a lease is made upon condition that if waste be done he may re-enter, there if the house falls by tempest, he cannot re-enter, but if it be uncover'd by tempest, and stands, there if the tenant has sufficient time to repair it, and does not, the lessor may re-enter, but not immediately upon the tempest, for it is no waste till the tenant suffers it so that the timber be rotten; per Hull; and then it is waste. Br. Conditions, pl. 40. cites 11 H. 4, 5. If he suffers it to continue unrepaired, so that at last the house is cast down by a tempest, it is waste. Mo. 62. pl. 173. Trin. 6 Eliz. Anon.—See Tit. waste, pl. 44. and the notes there.

[2. [So] if a man leases land, upon condition that the lessee shall not do waste, and after a *stranger does waste*, yet this is not any forfeiture, because a condition shall be taken strictly. Pasch. 44 Eliz. B. R. between *Basspole and Longe*, by three justices.] If a man leases land for years, upon condition that the lessee shall not cut trees; if the lessee makes lease for a year, and the said lessee cuts the trees, this is no breach of the condition. Mo. 49. pl. 149. Pasch. 5 Eliz. Anon.

[3. If a man makes a feoffment in fee, reserving rent, upon condition that if the *rent be behind, and no distress* to be found upon the premises, to re-enter. If the rent be behind, and *no distress* but

but a cupboard in a house lock'd, so that the feoffor cannot come at it, this is a forfeiture; for when the place is not open to the distress, it is all one as if there had been no distress there. Mich. 21, 32 Eliz. B. R. per Wray, upon a special verdict.]

4. If a man is to carry a load of timber to a wharf to be laid down where the owner shall appoint, if the carrier gives notice where he will carry it, and requires the owner to appoint a place, which he does not, the carrier may unload the timber in any convenient place at the wharf, and return. 2 Lev. 196. Trin. 29 Car. 2, B. R. Virtue v. Bird.

5. Where upon payment and receipt of money a man is to do so or so, it was held that a tender is as much as an actual payment. Per Holt, Ch. J. 6 Mod. 33. Mich. 2 Ann. B. R. in case of Squire v. Grevel cites Sti. [481] London v. Craven, and said that the authorities have been so ever since.

[155] 6. Devise of lands to trustees, to the use of plaintiff and his heirs male, in case plaintiff's father settle 2 thirds of the estate which was settled on plaintiff's father on his marriage; and in default thereof, or in case of plaintiff's death without issue, trustees to hold the lands to their own use. Plaintiff's father by will devises all his lands, being 6000 l. per ann. charged with 30,000 l. debts, to his son the plaintiff for life, remainder to his first &c. son in tail male. This is a good performance of the condition. Vern. 79. pl. 73. Mich. 1682. Popham v. Bampfield & al'.

(U. a) Condition broke. What act shall be said a Forfeiture. [Doing his Endeavours, or putting in another's Power to perfect it &c. pl. 1, 2, (2), 3, 4.] * [Quiet Enjoyment, pl. 6. &c.]

• See (U. a) 2.

Cro. J. 74. 75. pl. 4. Horton, v. Horton, S. C. the condition was, that he should not alien to any besides his children. [1. If there be lessee for years, upon condition not to devise it to any body, but only to his sons or daughters, and he devises it to a stranger, and dies, and his executor never consents to the devise, yet this is a forfeiture, because he hath done all that was in his power to pass it by the will; and this puts it in the power of an executor to execute it. Trin. 3 Jac. B. R. between Burton and Horton, by three against one.]

Lessee devised part of the term to H. his son after the death of his wife, and made two strangers executors and died. Three justices held, that it was not any breach of the condition, but Williams J. e contra; for they said that this was not a devise to the wife by implication, for if so it would make a forfeiture of the estate; and this devise to the son, after the death of the feme, is only a demonstration when his estate shall commence, and the executors may well have it in the interim, and a difference was taken between a devise to the heir after the death of the wife, and this devise to the son after the death of the wife, as to her taking an estate by implication, and cited 13. H. 7. But they held, that if the devise be allowed to be to the feme by implication, although the executor never assented thereto, yet it is a breach of the condition; for he thereby made an alienation; and the non-consenting of a stranger shall not take away the advantage which the lessor had by this act. So it was resolved in the lord Borough's case in this point.

[2. So if such lessee *devise* the term to his executor for payment of his debts, (as it seems it is to be intended to make the devise void) though this devise is void, because the law had vested it in him for the (*) same cause, yet in as much as he hath done his endeavour to pass it by the devise, this is a forfeiture. Trin. 3 Jac. B. R. in *Burton and Horton's case*, held by three.]

[(2). [So] if lessee for years, upon condition not to alien without the assent of the lessor, makes his executor, and devises it to him, and the executor enters generally, the testator not being indebted to anybody, this is a forfeiture of the condition. P. 43 El. B. R. between * *Dumfries and Simms* agreed per Curiam.]

executor by entering generally shall be in as legatory, because then clearly by the devise the condition is broken; and Gawdy J. said, that he shall, but the other justices said nothing to that point. — 3 Rep. 119 b. S. C. but not S. P. — See devise (D. a) pl. 3. lord Windsor's case. — S. P. adjudged a forfeiture and breach of the condition, because the general entry shall be intended as devised; cited Arg. Mo. 351. pl. 470. and Fenner J. said it was true, and so adjudged to his knowledge 20 Eliz. Ld. Boroughs v. Ld. Windsor.

[3. If there be a grantee of a reversion, upon condition not to grant it over to J. S. and he grants the reversion to J. S. by his deed, though the lessee never attorns, yet this is a forfeiture, because he hath done his endeavour to grant it, and put it in the power of a stranger to perfect it. Tr. 3 Jac. B. R. in *Burton and Horton's case*, per three.]

[4. If lessee for years covenants not to assign it, by which it may come to J. S. and obliges himself to perform covenants, and after he assigns it to J. D. this breaks the condition, in as much as by the means it may come to J. S. Tr. 13 Ja. B. between *Cumin and Richardson*, per Curiam.]

[5. If the condition of an obligation be, that he shall not be aiding and assisting to E. in any action to be prosecuted against L. the obligor [obligee] and after the obligor joins in a writ of error with E. and another against L. upon a judgment in trespass against them three, which is apparently erroneous; this is not any breach of the condition, for this is not properly an action, but a suit to discharge himself of a tortious judgment, in which they ought all to join. H. 17 Ja. B. between *Lambe and Tomson*, dubitatur.]

plaintiff; and adjudg'd to be no breach. — Hutt. 40. S. C. adjudg'd accordingly; and if he would have restrained him from joining in a writ of error, it ought to have been precisely contain'd in the condition, and shall not be taken by a large exposition to make a forfeiture of an obligation, by a general and ambiguous sense.

[6. If a man leases for years, and covenants with the lessee, that he shall enjoy it without any lawful interruption by the lessor, or any claiming under him, and also covenants that the land shall remain and continue to the lessee and his assigns, of the clear yearly value of 20 s. over all reprises during the term, and after the lessor enters upon the lessee, and ousts him tortiously, and takes the profits for several years, so that it does not continue to the lessee of any value, for [because] the lessor took profits, he hath broke his covenant; for though the lessee may have an action for the interruption upon another covenant, yet by the special words he hath covenanted, that the land shall

{ Fol. 429. }

* Cro. E. 815, 816.

pl. 5. S. C. but S. P. is only mentioned obiter whether this

condition is broken

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shall continue to the lessee of such a value, and so the *lessee may have his action upon one covenant or the other*; and it shall not be intended, that the covenant was made to the intent to warrant the land to be of this value generally, and not to the lessee, when it is expressly covenanted, that it shall continue to the lessee of this value. Trin. 11 Car. B. R. between *Cave and Brooksby*, adjudged upon demurrer per totam Curiam, except Brampston, who doubted thereof; but there the first covenant did not appear in the pleading, for this was not pleaded; but the court, ut supra, delivered their opinion as if it had been pleaded. Intratur. P. 11 Car. Rot. 265.]

It was agreed according to the books of 20 H. 7. 12. and 46. E. 3. 5. that if the lessor ejects his lessee, he may have action of covenant.

7. If A. leases lands to B. for years by indenture, and covenants that B. shall *enjoy the land peaceably and quietly* to his own use, according to the intent of the indenture, *without any lawful impediment*, suit, disturbance, ejection, contradiction, molestation, charge, incumbrance, or denial of the said A. and after *A. enters upon B. and disturbs him in the taking of the profits, without any lawful title, but as a trespassor*, this is not any breach of the covenant, because it is expressly limited that he shall enjoy it without any lawful disturbance; and so a *disturbance by tort is out of the covenant*. Mich.

11 Car. B. R. between *Dawie and Sacheverel*, per Curiam, adjudged upon a demurrer, in an action of debt upon an obligation, (* the condition thereof was for the performance of the covenants of an indenture. Intratur, 11 Car. B. R. Rot. 437.]

Yelv. 226. Doughty v. Fawne. S. C. says the court after great debate, was against the plaintiff upon the matter of pleading. — Brownl. 117. S. C. but is only a translation of Yelv. — 2 Bulst. 19. S. C. adjudged against the plaintiff on the point of pleading.

* [157]

[9. If the parson assumes to the parishioners, in consideration &c. that he shall be *discharged of the tithes of the lands*, and after *sues him in the ecclesiastical court for his tithes*; this suit, tho' he does not there compel him to pay the tithes, is a breach of the assumpsit. M. 10 Ja. B. R. between *Brown and Kinman*.]

[10. If lessee for years assigns it to J. S. and after assigns it to J. D. and covenants with J. D. that he is *possessed of the term, and that J. D. shall enjoy it*, and shall be saved harmless of all incumbrances done by him; the *first assignment is not any breach of the covenant before entry made by J. S. nor any disturbance of the possession of J. D.* M. 8 Ja. B. between *Lamme and Sir Lewis Tresham* per Curiam.]

Hob. 35. in pl. 39. S. C. cited. — Cro. E. 344. pl. 15. Corrus's case, adjudged for the plaintiff

[11. If the lessor covenants with his lessee for years, that it shall be *lawful for the lessee peaceably &c. to enjoy the land*, and after the *lessor enters tortiously upon the lessee, and ousts him*; this is a breach of the covenant, for the intent was, that he should enjoy it without the interruption of the lessor. H. 39 Eliz. B. R. *Core's case* adjudged. So it would have been, tho' the word (*peaceably*) had

had not been within the covenant. Hob. 49. 20 H. 7. 12. 6 E. without argument. 3. 4.] See

(R. a) pl. 4. S. C.

[12. [S₂] if the lessor covenants with his lessee, that he *shall* have 3 Le. 45. pl. and *enjoy* the land *quietly and peaceably without eviction and interruption of any person*, and after a *stranger enters by tort*, yet this is a breach of the condition, because the covenant is, that he *shall* not be interrupted in his possession. D. 16. El. 328. 8. [Mountford v. Catesby.] 96. S. C. but S. P. does not appear. S. C. cited Hob. 35. and seems to be approved.

—S. C. cited Godb. 48. —S. C. cited by Vaughan Ch. J. Vaugh. 120. and says this case is not expressly denied in Essex and Tisdale's case, Hob. 35. —S. C. cited 2 Vent. 62. and said, that it seems to go upon the words of *absque interruptione alicujus*, and cited Cro. J. 425. [pl. 10. Pasch. 15. Jac. B. R. Brooking v. Cham.], where the promise was to enjoy without the interruption of any person, and yet held that a title ought to be set forth. —When a man covenants, that his lessee *shall* enjoy his term against all men, he does neither expressly covenant for his enjoyment against tortious acts, nor does the law so interpret his covenant; so where the lessor covenanted that lessee should enjoy against his assigns, he does not covenant expressly against the tortious acts, nor ought the law to interpret, that he does any more than in the other case; per Vaughan Ch. J. Vaugh. 123. Pasch. 22 Car. 2. C. B. in case of Hayes v. Bickerstaff.

[13. So if the covenant be, that the lessor *shall save harmless the lessee, concerning the premises* and profits thereof to be received, *against J. S. parson of D.* If *J. S. after ejects the lessee without title*, the covenant is broke. Hobart's reports 49. cites H. 30 El. *Foster's case* adjudged.] Cro. E. 212, 213. pl. 4. Foster v. Mapes, S. C. in B. R. for when the covenant is to save them

harmless against a person certain, he ought to defend him against the entry of that person, be it by droit or tort, for he is damnified if he be disturbed, though by wrong, as 2 E. 4. 18. But if the covenant had been to save him harmless against all persons, there it shall be taken for a lawful entry or eviction; and the words (to save harmless) amounts to more than a warranty, for that is for lawful uses; But here is to be intended, that J. S. had good title, for it is alleged that he is parson, and this is of the rectory, and that he entered and let it, by which it shall be intended he had interest, and it was adjudged for the plaintiff. —Ow. 100. S. C. adjudged for the plaintiff. —Le. 324. pl. 458. S. C. adjudged for the plaintiff. —Hob. 35. in pl. 39 cites S. C. as adjudged that the covenant was broke for two reasons; one was because it was to save harmless for the receipt of the profits, * and the other because it was against a person certain; both which did import that they should receive no harm by that person touching the profit. —S. C. cited Vaugh. 127, 128. by Vaughan Ch. J.

[14. [So] if the lessor covenants with his lessee, *that he should have, occupy, and enjoy* the land demised, and after a *stranger enters by tort, and ejects him*, this is not any breach of the covenant, for *the law will not construe this covenant to extend to tortious acts, without an express covenant.* Hobart's reports, *Tifftel and Sir William Essex*, 48. adjudged.] * [158] Hob. 34, 35. pl. 39. S. C. adjudged. — Mo. 861. pl. 1183. H. 11. 12 Jac. S. C. resolved that he ought to show a title

in the stranger, otherwise it is where it is alleged in lessor himself; and another diversity was taken between a covenant implied, as in the words of the demise, &c. and a covenant express, as that he shall save harmless, and that lessee shall enjoy the lands, &c. for in the first case the covenant is not broken by the entry of a stranger, unless the entry be by title, which amounts to an eviction of the term. But upon a covenant express, the lessor is bound to defend the land against the entry of any man, and judgment for the defendant. —Brownl. 23. S. C. adjudged for the defendant, because the breach was naught. —3 Bulst. 204. S. C. says it was laid that he did enter, and conatus fuit to take the possession, and they disturbed him and put him out. Coke Ch. J. said, that this covenant shall be against all men; and so without further debate the court held, that here was a clear breach of covenant, and judgment was entered for the plaintiff. —Roll. Rep. 397. pl. 23. S. C. according to 3 Bulst. and judgment accordingly for the plaintiff. —Vaugh. 120. S. C. cited by Vaughan Ch. J. said it was adjudged, that the interruption must be legal or an action of covenant will not lye, because there is remedy against the interruptor. —But if he be bound to warrant the land, &c. the bond is not forfeited

forfeited unless the obligee be impeached, and then the obligor must be ready to warrant. *Co. Litt.* 384. 2.

Mo. 859. [15. [50] if the lessor covenants with his lessee for years, that
pl. 1179. he quietly and peaceably shall enjoy the land, without the impediment
8. C. in and disturbance of the lessor &c. and after the lessor exhibited a bill
C. B. ad- in chancery against the lessee, supposing this lease was made in trust
judg'd against the for certain purposes, but there it is decreed against the lessor; this
plaintiff, be cause it was is not any breach of the covenant, because the *chancery hath nothing*
a suit of to do to meddle with the possession, but only with the person, and this
equity, and suit stands with the covenant, scilicet, the trust. *Tr. 12 Jac. be-*
not at com- tween *Selby and Shute* adjudged.]
mon law.

—Brownl.

23. 8. C. adjudged for the defendant. — *Raym.* 371. S. C. cited by *Raymond J. Arg.* and says, that by the record itself in *Winch's Entries*, 116. it appears that judgment was given for the plaintiff; and *Winch* was one of the judges that gave the judgment, for this was 11 Jac. and he was made judge 9 Jac. and so he should know better than any of those who report the case, none of which then attended the court of C. B. but *Brownlow*; and this judgment is entred not in his, but in *Waller's* office.

2 Brownl.

277. Mich.

7 Jac. C. B.

Miller v.

Francis,

S. C. ad-

judged. —

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16. If a man devises lands upon condition, that if he does not permit the executors of F. to take the goods that then were in the house, the estate should be void &c. A denial by parol is not any breach of the proviso; but it ought to be an act done, as the shutting the door against the executors, or laying his hands upon them to resist them, or such like acts, so that by reason of any such act he did not (*) permit them to take or carry the same goods according to the proviso. *Co. 8. Francis* 91. resolved.]

Lutw. 813.

Trin. 11 W. 3. C. B. all the court were of opinion, that the principal case of *Francis* is good law, but it was cited there on the point of notice.

[159] [17. If A. and B. are executors of C. who was a freeman of London, and A. upon the marriage of E. the daughter of E. covenants with F. who is to marry with E. that it should be lawful for the aforesaid F. from time to time after the marriage aforesaid, to see and inquire into all such accounts as should concern the estate of C. the testator, by which he may see what money became due to be paid to E. In this case, if B. the other executor hath any accounts which concern the said estate of the testator, and F. requires A. and B. to see and search the said accounts, and B. refuses to permit him to do it, but A. says he does not deny to do it, yet A. hath broke the covenant, for by this covenant he hath undertaken for B. and all other strangers, who have any such accounts, that they will permit F. to see and search for the cause aforesaid, by force of the words of the covenant, that it should be lawful for the aforesaid F. Hill. 8 Car. B. R. between *Roberts and Willamot* adjudged per Curiam, upon demurrer. *Intratur Mich. 8 Car. Rot. 492.*]

18. Feoffment to his son and heir apparent is no alienation within the condition. *Arg.* 2. *Le.* 82. in pl. 110. cites 46 E. 3.

19. If a parson makes a lease for years, and then resigns, it is a breach of covenant. *Hob.* 35. pl. 39. in case of *Tisdale v. Essex* cites 12 H. 4. 3.

20. Debt against executors upon obligation with condition that if the testator of the defendants did his endeavour to collect 10 l. rent for

for the plaintiff of his manor of D. and to render account of it next Whitsontide, and of this make gree to the plaintiff, that then &c. and said that the testator did his endeavour to collect the rent, and that the testator died such a day before Whitsontide &c. and the plaintiff said that he did not do his endeavour; and so see that this suffices for all, for if he cannot receive it, he cannot render account thereof, nor pay the arrears. Br. Conditions, pl. 92. cites 38 H. 6. 2. 3.

21. Condition of a lease was, that if he alien to any person during his life, the lessor may enter; lessee devises it to another, this does not take effect in his life, but has an inception in his life. Per Dod. Roll. R. 214. cites D. 45. b. 31 H. 8. [pl. 3. Parry v. Harbert, and it seem'd to Brook and Hales, master of the rolls, that it was a forfeiture.]

And tho' he devised it to his executors, who accepted it only as executors, and not as devisees, yet it

was held a breach, because he did what he could to have devised the land. 3 Le. 67. pl. 100. Hill. 19 Eliz. C. B. Anon. — 4 Le. 5. pl. 20. Parry v. Herbert. S. C. in totidem verbis.

22. Condition that he, his executors, or assigns, shall not alien without consent of lessor. B. died intestate, his administrator alien'd without leave; per Periam J. the administrator is not within the penalty, for he is not in merely by the party, but by the ordinary; and per Mead and Periam J. if a lease for years upon such a condition be extended upon a recognizance, 'tis not an alienation against the condition; but if some lessee for years on such condition takes husband, and dies, the husband is within the danger of the condition, for he is assignee. If the king grant to a subject bona & catalla felonum, and lessee for years on such a condition is outlaw'd, upon which the patentee enters; now per Periam J. the patentee is not bound by the condition, but Mead J. contra, for the condition shall go with the land. Le. 3. pl. 6. Mich. 25 & 26 Eliz. C. B. Moor v. Farrand.

Cro. E. 25. Sir Wm. More's case ad udg'd. that the condition was broke, for the administrator is an assignee in law. S. C. — And. 123. pl. 272. Smallpiece v. Evans. S. C. held accordingly by 3 justices, but the other e contra.

23. Donee on condition not to alien has issue 2 daughters; one levies a fine sur consuance &c. Come ceo to the other. Adjudged a forfeiture. Le 292. pl. 400. Mich. 26 & 27 Eliz. B. R. Anon.

Cro. E. 35. pl. 2. Croker v. Trevelyan. S. C. within the daughter.

ters had issue 2 sons and die, and one of the sons discontinues the land; and held a breach of the condition.

24. Lease for 60 years, and so from 60 to 60 without rent, amounts to an alienation. 2 Le. 82. pl. 110. Mich. 29 Eliz. B. R. Large's case.

3 Le. 182. pl. 213. S. C. — The word alienation,

in conditional estates among subjects extends not to a lease for 21 years or a life; for the term granted is ordinary and reasonable as some think. Jenk. 275. pl. 97.

25. A. was bound not to alien such a manor. Alienation of one [160] acre parcel of it, is a breach. Arg. 2 Le. 83. pl. 110. Mich. 29 Eliz. in Large's case.

26. Entering into a statute to the value of the land may be construed alienation within the intent of a will. Per tot. Cur. 2 Le. 83. pl. 110. Mich. 29 Eliz. B. R. in Large's case.

3 Le. 183. S. C.

Cro. E. 331. 27. A lease was made for years, upon condition *not to devise* [*devise*] *the land, or assign over his term, and by his will be devised it*; pl. 8. Berry v. Taunton, S. C. *states* the condition to be, that if he, his executors or assignees, de-

mise the lands more than from year to year, then the lease to be void; and he devised it to his son who entered by assent of the executor, and all the justices held it a breach; for a condition shall not be taken so strictly, that it shall be according to the precise words, and if the meaning be broken, it is a breach of the condition, and judgment accordingly. Gouldsb. 184. pl. 142. Cole v. Taunton, S. C. held a breach. —Ow. 14, 15. Taunton's case, S. C. resolved, that *rigore juris* this is a breach, yet it was said that it was very hard, according to equity, that the estate should be lost; for he intended by his will to prefer his youngest son to whom he devised it, and not to break the condition, and did not think that it was any breach of it, and for this cause some doubt was made of the case; but afterwards judgment was given as aforesaid. —Poph. 106. S. C. *adjudged per tot. Cur.* —S. P. by Rhodes J. Gouldsb. 49. in pl. 10. —S. C. cited D. 45. b. Marg. pl. 3.

D. 152. a. 28. Debt upon obligation for performance of covenants, one was, pl. 7. Mich. 4 & 5 P. & M. Anon. S. P. and 3 justices held, that the restraint was not determined by the lease being granted by the lessor's executors to one of his sons, and so he could not grant it over without licence; but Stamford and Catlin held that he might, for that the restraint was determined. —S. C. cited 4 Rep. 120. B. by the reporter, who seems to approve of the opinion of Stamford and Catlin as law.

29. Lessee for years upon condition that *if he devised the premises, or any part thereof, for more than one year, then the lessor, &c. might enter*; he did not lease it, but *he devised it to his son*; this was held a breach of the condition. Gouldsb. 184. pl. 142. Hill. 43 Eliz. and says that the case of 31 H. 8. 45. rules the law in this case; for a devise is taken for a breach of the condition, and cites 27 H. 8. 10. but the reporter adds a *quære* if he might not have suffer'd it to come to his son as executor.

S. P. held accordingly by Daniel and Walmfley, but Warburton *e contra*. Cro. J. 61, 62. pl. 7. S. C. 30. *Devise to A. in tail provided not to alien otherwise than to* lease for the term of any number of years as may be determinable upon the death of three or fewer persons, &c. and in case of alienation the remainder over to B. A. made a lease for 1000 years to J. S. who never entered; Per omnes J. *præter Warburton J.* this is no alienation within the proviso on which an estate may arise to B. because A. who made this lease was but tenant in tail, and then the lease is determinable on his death, and so the issue is not prejudiced; and it was not the intent of the devisor to restrain A. to make a lease which should determine by his death, because it could not prejudice the issue, which was what the devisor was taking care of; besides,

besides, if he had annexed an express condition, that the tenant in tail should not make an estate during his own life, it would be a void condition; but Warburton J. e contra. Mo. 772. pl. 1067. Trin. 2 Jac. C. B. Lovice v. Goddard.

31. A. makes lease for years to B. *Lessee gives bond not to alien the said term, and in the lease is a condition not to assign the lease without consent of lessor*; the lessor gives him licence by deed, and upon this the lessee alien; the bond is forfeited. Jenk. 120. pl. 41.

32. A manor was granted on condition not to alien any part by which it should not immediately revert; a grant of a copyhold was not within it; per Coke Ch. J. Roll. R. 203. in pl. 4. Trin. 13 Jac. B. R. cites D. 17. El.

33. *Jointenants* upon condition not to alien, and one releases to the other, 'tis no breach of the condition; per Hitcham Serjeant. Win. 3. Pasch. 19 Jac. in case of Wase and Pretty.

S. C. cited by Raymond J. Raym. 413. as said by Winch J. Co. Litt. 184.

and Hitcham, that it makes no degree for releases is in by lessor, and cited Co. Litt. 184.

34. *Committing treason* is no breach of a condition not to alien; per Jones J. Jo. 20. Hill. 20 Jac. cites 7 El. D. 243. Lord Arundel's case.

But per Hobart Ch. J. Arg. Forfeiture for felony or treason or trea-

son is an alienation as well as feoffment. Jo. 80. Pasch. 1 Car. in Cam. Scacc.

35. Condition that if A. observe, fulfil and *accomplish the last will* of B. and shall content and pay all bequests and legacies according to the intent and true meaning of the said last will. B. was seized of lands in capite, and devised them by his last will to C. in fee, and gives diverse legacies, and makes D. his executor, and dies. A. (who was heir at law) enters into the third part of the land. Per three justices this was no forfeiture, but per two justices it was a forfeiture; but they made a general certificate to chancery, that by the opinion of the major part it was no forfeiture, and so it was decreed. Jo. 265. Trin. 8 Car. Egerton v. Egerton.

36. It was said, that if *lessee for years covenants with the lessor not to assign over his term without the lessor's consent in writing*, and afterwards without such consent devises the term to J. S. this is not a breach of the covenant; for a devise is not a lease. Sty. 483. Trin. 1655. in case of Fox v. Swann.

37. Bond conditioned to perform covenants, whereof one was to repay money, if the defendant or others should sue or trouble, charge or vex the plaintiff as administrator; adjudged, that a suit in equity is a suit within the condition, and that whether the suit be for the same money or not, so it be against him as administrator. 2 Keb. 288. pl. 63. Mich. 19 Car. 2 B. R. Ashton v. Martyn.

38. Debt on bond to pay such costs as should be stated by two arbitrators by them chosen. Defendant pleads, that none were fixed. Plaintiff replies, that defendant brought not in his bill. Defendant demurred; for though if the defendant were the cause that no award was made, it was as much a forfeiture of his bond as not to perform it would be; yet here there was a precedent act of the

plaintiff's necessary viz. to chuse an arbitrator, which he ought to have shewn before any fault could be assigned in the defendant in not bringing in of his bill, and to this the court did incline; sed adjournatur. Vent. 71. Pasch. 22 Car. B. R. *Baldway v. Oufston*.

[162] (U. a. 2) For quiet Enjoyment. See (U. a) pl. 6. &c.

The warranty extends only to acts done or to be done by the defendant. Mo. 58. pl. 164 S. C. —Dul. 58. pl. 8. S. C. adj'd accordingly. —Tenant pur autur vie leased for 21 years, and covenanted, that he had not done any act, but that the lessee may enjoy it during the term. Cesty que vie died within the 21 years. Adjudg'd that covenant does not lie; for the word (but) refers the subsequent words to the precedent words. D. 240; Marg. pl. 43. cites 40 Eliz. B. R. *Peel v. Jervies*.

1. *FEME recovers in dower against lessee. Afterwards lessee leases over, and covenants habend' &c. pacifice gaudend' &c. and that he had done no act to impeach &c. but that the assignee might quietly have &c. the premises &c. without any disturbance &c. of him, or of any other person, and gave bond for performance. Resolved the words (but that) depend on the precedent matter, and have relation to the words (that the lessee had not done any act) and are not absolute words, and judgment for defendant. D. 240. pl. 44. Trin. 7 Eliz. *Broughton v. Conway*.*

2. *A parson leased his rectory for 3 years, and covenanted that lessee shall have and enjoy it during the said term without expulsion, or any thing done or to be done by the lessor, and gave bond to perform the said covenant; afterwards, for not reading of the articles, he was deprived ipso facto by the statute of 13 Eliz. The patron presented another, who being inducted ousted the lessee. It was the opinion of all the justices, that this matter is not any cause of action, for the lessee was not ousted by any act done by the lessor, but rather for nonfeasance, and so out of the compass of the covenant; as if a man be bound that he shall not do any waste, permissive waste is not within the danger of it. 4 Le. 38, 39. pl. 104. Pasch. 19 Eliz. C. B. Anon.*

3. Condition that B. shall enjoy a lease of Bl. Acre immediately after his death, the land being sown; the executors of A. take the corn. It was held that it is no forfeiture, because by law the corn belongs to them. 4. Le. 1. pl. 1. Hill. 20 Eliz. *Launton's case*.

6. C. cited by Raymond J. Raym. 371. 3-2. says, that the lessee could not be disturbed by that suit against the lessor, and he took it, that such a suit is not a breach of covenant against incumbrances, because a decree is no incumbrance upon the land, but a molestation to the person; and the law takes notice of suits in chancery, for a forbearance to sue in chancery is a good consideration to ground an assumpsit, and of this opinion were the other 3 judges. —The case was, viz. in assumpsit, &c. the plaintiff declared of a dis-

couse

course between him and defendant concerning a portion of tithes in B. and concerning a verdict against one H. T. for 18 l. obtained by the plaintiff for the tithes of B. Mead, and that the defendant, in consideration the plaintiff would, at his request, acquit the said H. T. from the said 18 l. &c. and all arrears of tithes, &c. did promise to allow the tithes bay of B. to be the right of the plaintiff, as belonging to the said portion of tithes, and that the plaintiff from thenceforth should quietly receive the same without interruption, and assigned a breach, that the defendant did not permit him to receive the tithes of B. without any interruption, but in such a term did prosecute two suits in the Exchequer against him, ad damnum, &c. The plaintiff had a verdict and judgment, and upon a writ of error brought, the question was, Whether a suit in the Court of Equity is such a breach of this agreement, as the common law can take notice of it? All the judges held that it was; for the law takes notice of such suits. Raym. 370. Trin. 32 Car. 2. B. R. Hunt v. Danvers.

5. B. granted the next avoidance to T. and gave bond to T. that [163] he should enjoy the said presentment without any disturbance or claim of the said B.—S. released to B. his interests in the said advowson. The church became void. B. offered to join with T. in presenting to the avoidance. It was held, that the obligation was forfeited, although that B. had a puisne title to it after the obligation was entered into. 4 Le. 18. pl. 62. Mich. 26 Eliz. C. B. Bluet's case.

6. Condition to permit the plaintiff quietly to take, reap, and Godb. 28. carry away corn. Coming on the land with staves, and forbidding pl. 30. Anon. him to reap was adjudg'd a breach. And. 137. pl. 188. Mich. S. P. held accordingly, and seems to be S. C. 26 & 27 Eliz. Burr v. Higgs.

S. C. cited by Raymond J. Arg. Raym. 371. Trin. 32 Car. 2. B. R.

7. B. sold lands to P. and covenanted that B. and his heirs should quietly enjoy the lands without any interruption; afterwards some controversies arising concerning the title, they submitted to the award of Sir W. C. who awarded that P. and his heirs should quietly enjoy the lands in tam amplo modo, as the same were conveyed to him, and the truth was, that at the time of the executing the said conveyance, the vendor stood bound to M. in a recognizance of 600 l. who after the conveyance sued out an elegit, and took the moiety of the lands in execution; and in an action of debt brought by the plaintiff, for non-performance of this award, it was argued that the lands passed with the charge, and when B. covenanted that P. should quietly enjoy, that covenant is a collateral security, and the award that he should enjoy in tam amplo modo as the lands were convey'd to him, give him no new title, for they are not words of assurance, for the assurance consists in the legal words of passing an estate, viz. Dedi, concessi, &c. and in the limitation of the estate, and not in the words of the covenant. And it does not appear that there was any interruption of the vendee, because the execution by elegit was illegal; for it appears that M. sued it by elegit 4 years after the judgment in the sci. fa. whereas he should have brought a new sci. fa. and the sheriff should return, that the cognisor, after the recognizance had infeoffed the vendee, and upon that return the cognisor should have a sci. fa. against the feoffee. And the court was clear of opinion against the plaintiff. 1 Leon. 20. pl. 34. Pasch. 27 Eliz. B. R. Allington v. Bates.

8. Debt on a bond, conditioned to suffer the plaintiff's tenants to enjoy such a common; the defendant pleaded conditions performed, the plaintiff replied that he did not suffer A. B. his tenant to enjoy &c. abque hoc, that he had performed the condition; the court held this

traverse ill; for 'tis no more than he had pleaded before (viz.) that he did not suffer the tenants to enjoy. Goldsb. 62. pl. 21. Trin. 29 Eliz. Gawen v. White.

And. 162. 9. *K. leased lands to H. for years. H. by will devised the use and occupation of the said land to his wife so long as she continues a widow, and if she died or married that his son shall have it; H. dies. K. by feoffment conveys the land to his wife, and covenants, that from thence it shall be clearly exonerated de omnibus prioribus barganniis, titulis iuribus, & aliis oneribus quibuscunque. The wife marries and the son enters. This is a breach, and the whole court agreed, that the land at the time of the feoffment was not discharged of all former rights, titles and charges, and therefore judgment was given for the plaintiff. Le. 92. pl. 120. Mich. 29 & 30 Eliz. Hamington v. Rider.*

she should hold the land discharged, which now upon the matter she does not; but by the marriage the land becomes charged with the lease.—Ow. 6. Haverington's case, S. C. and adjudged, that no act which the wife can do in purchasing the inheritance by which the term is extinct, shall bar the possibility which the son had to come upon her marriage; and that this possibility of the son to have the residue of the term, which at the time of the feoffment was but dormant shall be accounted a former charge and before the covenant, because of the will which was before the covenant, and shall awake and have relation before the marriage.—Gouldsb. 59. pl. 17. S. C. adjournatur.—Ibid. 65. pl. 7. S. C. and the whole court agreed, that it was an incumbrance and not discharged, and therefore gave judgment for the plaintiff.—Mo. 249. pl. 393. Mich. 29 Eliz. Anon. but seems to be S. C. only states it, that the wife after her purchase sold it again, and that she then covenanted that the land was discharged of all former incumbrances, and gave bond for performance of covenants, and aided, and the son claimed the term; and it was adjudged in debt on the bond, that the possibility in the son was a forfeiture of the wife's bond, because it was an incumbrance.—10 Rep. 52. a. b. S. C. cited by the Ch. J. as adjudged.—S. C. cited 2 Sid. 167.

¶ 164

10. Debt upon obligation by F. against G. the condition was, that if the obligee may enjoy certain tithes demised to him by the defendant during his term, against all persons, *paying yearly the rent of 3l. that then &c. to which the defendant said, that the plaintiff did not pay the said rent &c.* Beaumont Serjeant moved that the plea is not good, but he ought to say that the plaintiff enjoy'd the tithes until such a feast, at which time such rent was due, which rent he did not pay, for which &c. Quod curia concessit. 4 Le. 94. pl. 193. Mich. 33 Eliz. C. B. Foles v. Griffin.

11. In debt on bond conditioned to perform covenants in a lease, whereof one was, *that lessee should enjoy such lands let to him quietly and without interruption, and shews that the defendant, 20 March, 30 Eliz. had disturbed him; the defendant said that in the indenture was a proviso, that if he pay 10l. 31 March, 30 Eliz. then the indenture and all therein contain'd should be void, and said he paid the 10l. at the day.* It was adjudged for the plaintiff; for by the covenant broken before the condition performed the obligation was forfeited, and it is not material that the covenants become void before the action brought. Cro. E. 244. pl. 2. Mich. 33 and 34 Eliz. B. R. Hill v. Pilkington.

¶ 165. A person made a lease for years, in which were divers covenants, and afterwards he became non-resident, whereby the indenture became void, yet he might maintain an action of covenant for a covenant broken before his non-residency. Cro. E. 245. cites Bylowe's case.

12. But Wray said, if the proviso had been that upon the payment of the 20l. as well the obligation as the indenture should be void, it had peradventure been otherwise; for then the bond was void before the action brought. Cro. E. 244. pl. 2. Mich. 33 & 34 Eliz. B. R. Hill v. Pilkington.

13. A. made a lease to B. of land for years, and the lessee gave bond to pay M. N. 20l. for 17 years, if M. N. should so long live, and if he shall or may occupy or enjoy the same, and then the lessee surrendered the lease, and refused to make any further payment of the annuity. A. being dead, his executor brought debt on the bond, and judgment was for the plaintiff; for this payment is a thing collateral. Ow. 104. Trin. 35 Eliz. Ford v. Holbrow. Cro. E. 313. pl. 4. S. C. adjudged; for it is collateral, and B. might have enjoyed it during the time. Mo. 597.

pl. 315. S. C. adjudged accordingly. Poph. 39. Forth v. Holbrough, S. C. adjudged for the plaintiff; but if any had defeated the said term by a lawful entry, by a title paramount, the obligation had not been forfeited for any default of payment after such entry; per Popham. But Popham said, that if the condition had been, that if B. or his assignees, or those which should occupy the lands, should pay the 20l. and after B. had surrendered to A. and A. did not pay, the obligation had been forfeited; for in such case A. was the party who was to pay it, and he should not take the advantage of the non-payment. Cro. E. 313. in S. C.

14. Debt upon obligation to perform covenants of a lease, whereby the defendant had leased to the plaintiff a house by the words *demise and grant, and covenanted that the lessee should enjoy it without eviction, by him or any by his procurements. The lessee assigned over his term. S. a stranger entered upon the assignee, and leased it to D. The assignee re-entered,** whereupon D. brought ejectment against the assignee, and recovered by verdict. Popham inclined that this covenant in law, upon the words *demise and grant*, is taken away by the express covenant, but the other justices deliver'd no opinion as to that; but they all held the breach ill, for *not averring that S. entered upon good title*, for otherwise there is no cause of action; and tho' it be pleaded that D. recovered by verdict, yet that is not material, for it may be upon false verdict and without title, and resolved that judgment be entered accordingly; but the plaintiff had leave to discontinue. Cro. E. 674. pl. 2. Trin. 41 Eliz. B. R. Nokes v. James. 4 Rep. 80. Nokes's case. S. C. and resolved that the assignee shall have covenant on the covenant in law, by the words *demise, grant, &c.* and that by the breach of this covenant in law the obligation was forfeited, it being to perform all covenants, grants, &c. which extend as well to covenants in law as to covenants in deed; And further, that the said express covenant qualifies the generality of the covenant in law, and restrains it by the mutual consent of both parties that it shall not extend further than the express covenant, and that it was lately so adjudged in the same court in Hamond's case. S. C. cited by Vaughan Ch. J. Vaugh. 316. S. C. cited Arg. 5 Mod. 371. S. C. cited per Cur. Lev. 57.

15. Lessor covenanted that lessee for years might, or should, peacefully, quietly and lawfully enjoy the premises, without interruption of him or any other person. In debt on bond for performance of covenants the plaintiff for breach assigned the entry of a stranger who had no right, and the opinion of Coke and the court was clearly for the plaintiff. D. 328. a. Marg. pl. 8. cites Trin. 4 Jac. C. B.

16. Debt was brought upon an obligation to perform the covenants contained in an indenture; the covenant was for quiet enjoying without let, trouble, interruption, &c. The plaintiff assigned his breach, that he forbade his tenant to pay his rent; This was held by the court to be no breach, unless there were some other act, and the defendant pleaded, that after the time the plaintiff said that he forbade

the tenant to pay the rent to the plaintiff. Brownl. 81. Trin. 9 Jac. Witchcot and Lindsey v. Nine.

17. If *lessee* for years rendering rent, with condition of *re-entry* for non-payment of the rent, leases part for a less term under a less rent, and covenants that his *lessee* shall enjoy without impeachment of him, or of any other occasioned by his impediment, means, procurement, or consent; and after he neglects to pay his rent, upon which the first lessor enters, &c. This is a breach, adjudg'd per tot. Cur. clearly. 1 Bulst. 182, 183. Pasch. 10 Jac. Stephenson v. Powel.

* Cro. J. 315. pl. 17. Mich. 10. Jac. B. R. Kirby v. Fanfaker, S. C. accordingly. The reporter adds a note, that this exception was taken in B. R. after the verdict

18. Debt upon an obligation, condition'd that where the plaintiff had a lease for years from his lessor of certain land, *that the lessee should enjoy his land during the lease without eviction*; the breach was alleged in the replication in a recovery of this land by A. by verdict, and upon a good title; The issue was, *that the recovery was by covin*, and it is found for the plaintiff; he had judgment, which was reversed in the Exchequer-Chamber; for A. might recover this land by verdict without covin, under a title derived from the plaintiff himself* [after the obligation made] therefore the plaintiff ought to shew that A. had an elder title to [before] the said lease made to the plaintiff. Jenk. 340. pl. 95.

before judgment, and disallowed because the verdict had made it good. — In covenant by assignee of assignee of lands exchanged the breach assigned was that a stranger, *etens jus & titulum, d'd enter &c.* After verdict it was now moved, that the plaintiff had not shewed a sufficient breach; for he sets forth the entry of a stranger habens, jus & titulum, but *doth not shew what title, and it may be had a title under the plaintiff himself, after the exchange made*; and to prove this, the case of Kirby and Hantaker was cited in point, and of that opinion was all the court. 3 Mod. 135. Trin. 3. Jac. 2. B. R. Mosse v. Archer.

[.166] 19. Covenant; P. the husband of the defendant was possessed of a lease of a farm called N. for such a term, and covenanted that the plaintiff and his wife should enjoy it during the term, without the interruption of P. or his wife, and alleges the breach that such a day P. entered and ousted him. It was resolved in this case, that although the covenant is, that the plaintiff and his wife shall enjoy it, and the expulsion is of the plaintiff only, yet it is good enough, and a breach of the covenant, because the husband hath the sole profits and possession. Cro. J. 383. pl. 11. Mich. 13 Jac. B. R. Penning v. Platt.

a Roll. Rep. 62, 63. S. C. 20. If one be bound that he shall not continue such a suit, if he continues it by attorney it is a breach of the condition; but if the attorney enters the continuance without his privity, it is no breach; per Doderidge and Haughton J. Cro. J. 525. Hill. 16 Jac. B. R. in case of Gray v. Gray.

and Haughton, but Doderidge e contra.

21. A. granted to H. the presentation to the church of D. and gave bond, that if from time to time he shall make good the said grant from all incumbrances made or to be made by him and his heirs, then, &c. The grantor died, the church is voided, and the heir of the grantor presented, and whether this was a breach of the condition was the question? and Hobart Ch. J. and Winch being only present, thought this tortious presentation to be no breach of the condition, but this

extends only to lawful disturbances by the heir; and by the pleading here it appears, that though the heir presented, yet he had no right to present, because his father had granted that before, and then the presentation of the heir is as of a mere stranger. And those general words will not extend to a tortious disturbance by the heir; but Hobart said, that the words shall have such a construction as if it had been said, that he shall enjoy the same from any act or acts made by him or his heirs, and in this case there ought to be a lawful eviction to make a breach of the condition; but otherwise if the condition had been, that he shall peaceably enjoy from any act or acts made by him, or his heirs, in that case a tortious disturbance would have been a breach of the condition, but it was adjourned till another time. Win 25. Mich. 19 Jac. C. B. Hunt. v. Allen

22. Condition of a bond recited, that *copyhold lands were to be surrendered to the use of H. and G. and their heirs, by A. S. at her full age; and that G. should pay to H. 33 l. such a day, and if he did not, then the surrender should be to the use of H. and his heirs; if therefore A. S. at her full age, should surrender to the use of H. and his heirs, and that H. and his heirs may enjoy the same, then the bond to be void; the defendant pleaded that G. did not pay the 33 l. and that A. S. came to age such a day, and after in full court did surrender.* The plaintiff replied, that after the surrender G. entered and expelled him. Resolved that the replication was not good, because he did not shew that the expulsion was by title, for otherwise the bond does not extend to it. Cro. C. 5. pl. 1. Paich. 1 Car. C. B. Hamond v. Dod.

23. Debt on bond conditioned, that *whereas the defendant was about to marry such a widow, who was possessed of several goods of her first husband, and his children, that he would not meddle with them, but that she and her children should enjoy them without disturbance, &c. from him, &c.* The defendant pleaded performance generally. Plaintiff assigned a breach, that the first husband was possessed of such sheep and goods, and that the wife had them before her second marriage, but that afterwards the defendant took and detained them. After verdict it was moved, that the plaintiff did not shew that the husband did any act, or made disturbance, and so the breach not well assigned, and of that opinion were Hide and Jones; but Whitlock and Crook e contra; for by the allegation and the verdict for the plaintiff the court will intend it an unjust taking and detaining, contrary to the agreement; and Hide being afterwards of the same opinion, judgment was given (absente Jones) for the plaintiff. Cro. C. 204. pl. 9. Mich. 6 Car. B. R. Crowle v. Dawson. [167

24. In consideration of 130 l. paid, the defendant 7 Martii Anno 9 Car. 1643, sold the plaintiff all the furzes growing on such lands, to be taken before Mich. 1635, and promised that he should quietly carry them away without disturbance; and though he had suffered him to carry away 50 loads; he disturbed him from taking 1000 load growing on the same land; after judgment for the plaintiff it was assigned for error, that the plaintiff did not set forth any certain time of the disturbance, whether it was before Michaelmas 1635; but resolved

solved per tot. Cur. that this being after verdict is no error, for it shall be intended to be before that time, otherwise no damages would be given; besides 'tis not material to set forth the time of the disturbance, because 'tis collateral to the promise; and so the judgment was affirm'd. Cro. C. 497. pl. 1. Pasch. 14 Car. B. R. Hall v. Marshall.

25. Where a man covenants that he has power to grant, and that the grantee shall quietly enjoy from any claiming under him, those are two distinct covenants, and the first is general, and not qualified by the second; per Hale Ch. J. to which Wyld agreed; for one goes to the title, and the other to the possession. 1 Mod. 101. pl. 6. Mich. 25 Car. 2 B. R. in case of Norman v. Forffer.

26. Assumpsit in consideration the plaintiff promised to pay the defendant so much yearly for 5 years, for such a thing, he promised to save him harmless concerning the possession of it, but that such a one had evicted him, and the defendant had not saved him harmless. After verdict for the plaintiff it was moved that it is not shewn that he was evicted by title, and all such covenants extend only against lawful tithes and eviction; but per Cur. this agreement was only quoad the possession, and judgment for the plaintiff. 2 Lev. 194. Pasch. 29 Car. 2. B. R. Gregory v. Major.

per Judicium Curie, the court were all of opinion that judgment should be given for the plaintiff.

27. Covenant, &c. upon articles of agreement, wherein the defendant covenanted in behalf of M. (a stranger) that the plaintiff should quietly enjoy for a year a tenement called the Saktmarsh, except one close, parcel of the premises, to one E. K. The breach assigned was, that K. brought trespass against the plaintiff, and recovered damages and costs, &c. The defendant pleaded, that he did not break this covenant; After a verdict for the plaintiff, it was insisted that it did not appear that K. sued upon a title, and it was resolved by Powel and Ventris (absente the Ch. Justice and Rokeby doubting) that the declaration was ill for that reason; for the articles amounted to a lease, tho' by a stranger, because he acted in behalf of the owner of the land, and it shall be taken that he had authority to demise, and it appears he intended it a demise, for the part excepted is mentioned to be a dimissione prædicta; But if it were a collateral covenant by a stranger, it would be hard to extend it to a tortious entry. This is no covenant express against K. he being only mentioned for the part excepted and to have been tenant of the premises, and so the principle judgment was stay'd. Vent. 61. Trin. 1 W. and M. in C. B. Rathleigh v. Williams.

3 Lev. 325. Buckley v. Williams. Hill. 3. W. & M. in C. B. the S. C. says the objection was not allow'd, because the title of K. could not be supposed to be under the plaintiff; here, the declaration being that K. had title by a demise made to him before the articles made to the plaintiff, and be the title derived from whom it will, yet it being before the articles made with the plaintiff, the covenant is broke according to the case of Proctor v. Newton, Trin. 23. Car. 2. B. R. Rot. 856. where, upon a breach assign'd, as here, judgment was given for the plaintiff, the roll of which was brought into court, and upon view thereof, after divers motions, judgment was given for the plaintiff; Lewis a counsel for the plaintiff.

[168] 28. Condition that A. or his heirs, or assigns, shall re-convey to B. such land in fee. A. devises to C. (an infant) in tail, remainder to D. the

D. the condition is broken; contra if the land had descended to *C.* being an infant, because this had been an act in law. *Ld. Raym. Rep. 112. Mich. 8 W. 3. Hulbert v. Watts & Ux'.*

29. In covenant for quiet enjoyment, the plaintiff assigned a breach that the lessor entered upon him, and ousted him out of the premises. The defendant pleads, that he entered to distrain for rent in arrear, absque hoc that he ousted him de præmissis. Plaintiff demurr'd, because if he had ousted him of any part, he had good cause of action, and therefore should have traversed that he ousted him of the premises, or of any part thereof. But per Cur. the plea is well enough; for if the plaintiff will join issue on the matter of the traverse, and prove the ouster of any part, the issue will be for him, and they took a diversity between pleading the general issue as in debt, for there you must plead non debet nec aliquam inde parcellem, and pleading a special issue as this is. 2 Salk. 629. pl. 5. Pasch. 3 Ann. B. R. *White v. Bodinam.*

30. In the assigning a breach of condition for quiet enjoyment a particular act must be shewn by which the plaintiff is interrupted, otherwise it is ill. *Comyns's Rep. 228. pl. 126. Mich. 2 Geo. 1. G. B. Anon.*

(K. a) Condition to perform Covenants. [To what it shall extend.]

[1.] If a man leases a manor by indenture, except certain parcel of land, and in the indenture there are several covenants to be performed of the part of the lessee, and after the lessee for further security binds himself in an obligation to perform all the covenants, articles, and agreements contained within a pair of indentures, and names the said indentures, and after the lessee enters the land excepted, yet this is not any breach of the condition, for this land excepted is not leased, and so as if it had not been named, and therefore it cannot be intended an agreement to be performed on the part of the lessee within the intent of the indenture. Pasch. 41 Eliz. B. R. between *dams Russel and Gulwell* adjudged.]

—Cro. E. 657. pl. 1. S. C. held accordingly by Popham and Fenner, but Gawdy e contra; and Popham upon its being moved at another time said, that he had conferr'd with the other justices, and the greater part of them agreed, that this exception is not within the intent of the condition, and the bond not forfeited by this disturbance; wherefore it was adjudged for the defendant. And Popham and Fenner held, that an exception of a thing de-bors, which lessor had not before, as a way, common, &c. that is an agreement of the lessee's that he shall have the profit, and in such case a disturbance will forfeit the obligation, for there the lessor has an interest in the thing excepted.—S. C. cit d 12 Rep. 50. b. 51. a. as adjudged that the word (*præmissa*) should not extend to the thing excepted, but is all one in effect as (*prædemissa*).—S. C. cited accordingly by Coke Ch. J. Roll. Rep. 107.—S. C. cited Hob. 276.—S. C. cited Show. 388. in case of *Bush v. Coler*.—1 Salk 196. pl. 1. cites S. C. and the case there was, viz. By indenture H. leased a house excepting two rooms, and free passage to them. The lessee assigns, and the assignee disturbs the lessor in the passage thereto, and for this disturbance the lessor brought covenant; et per Cur. the action lies. The diversity is this; if the disturbance had been in the chamber, it is plain then no action of covenant would have lain, because it was excepted, and so not demised; aliter where the lessee agrees to let the lessor have a thing out of the demised premises, as a way, common, or other profits appender; in such case covenant lies for the disturbance. Cites 3 Cro. 657. and Mo. 553. And this covenant goes with the free part, and binds the assignee. Judgment pro quer.—Show. 388. *Bush v. Coler*, S. C. adjudged for the

the plaintiff. — Carth. 232. S. C. resolved per tot. Cur. that this exception amounted to a reservation, it being a thing newly created, and not in esse before, viz a way or passage. Now * upon a reservation an action of covenant will lie, as where rent is reserved covenant will lie upon the words of reservation, without any express words of covenant, and the plaintiff had judgment.

* [169]

[2. If a man leases for years, *rendring rent*, payable at *Michaelmas*, and at the *Annunciation*, upon condition, that if he does not pay it upon the said feasts, or within 14 days after, that it shall be lawful for him to re-enter; and the lessee binds himself upon condition to perform the covenants and agreements of this lease; and then the lessee does not pay the rent at the feasts, but [pays it] after, and within the 14 days, yet the condition is forfeited; for the condition in the lease is not part of the reservation. Mich. 13 Jac. B. between *Middleton and Ratcliffe*, per Curiam.]

3. A. by deed-poll reciting, that whereas he was possessed of certain lands for a certain term by good and lawful conveyance, assigns the same to J. S. with divers covenants, articles and agreements to be performed on the part of A. The question was, if the words (whereas he was &c.) be an article or agreement within the meaning of the condition of a bond given to perform &c. Gawdy held that it was, and Clench said that against this recital he cannot say that he has not any thing in the term. And at length it was clearly resolved, that if A. had not such interest by a good and lawful conveyance, the obligation is forfeited. 1 Le. pl. 164, 122. Trin. 30 Eliz. B. R. *Severn v. Clerk*.

Yelv. 206. *Bristowe v. Knipe*, S. C. adjudged, that the word (payments) in the condition of the obligation shall have relation only to such payments comprised in the deed as are compulsory to the defendant, and not otherwise; and

the neglect of the payment assigned for breach being in its own nature voluntary, either to be paid by the defendant or not, to which the condition of the obligation cannot by any reasonable construction extend, judgment was given against the plaintiff; quod nota. Yelverton was of counsel with the plaintiff. — Brownl. 113. S. C. in totidem verbis — Bullst. 156. *Briscoe v. Knight*. S. C. held accordingly per tot. Cur. and judgment against the plaintiff. — S. C. cited 2 Lev. 126 Mich. 26 Car. 2. B. R. where the case was, that in a bond for performance of all covenants and conditions in an indenture of mortgage was a proviso, that if the mortgagor paid the money at the day the mortgage should be void. Breach was assigned for non-payment at the day. It was moved that this was no forfeiture of the bond, but of the estate only, and that this condition was for the mortgagor's benefit to have his estate again on payment of the money, but not to compel him to pay it; And of this opinion was Hale, but Twissen contra, and he cited one *Westbrook's* case. Hill 22 Car. 1. B. R. to be so adjudged, and at another day brought the record of the case into court, whereupon Hale mutata opinione, gave judgment for the plaintiff. 2 Lev. 126. Mich. 26 Car. 2. B. R. *Tomlins v. Chandler*. — 3 Nev. 107. pl. 79 *Loon v. Chandler*, S. C. the defendant pleaded performance; the plaintiff assigned breach in non-payment; the defendant rejoined, that by the non-payment he was to lose his land,

land, and the court held this a departure, and the money is due by the bond, though the land is to be forfeited, and judgment for the plaintiff.——Ibid. 394. pl. 90. S. C. Twiden J. cited Hill. 22 Car. 1. of a lease to be void on non payment, and adjudged for the defendant, because the land was to be lost by the non payment, *Westbrook v. Print*, and conceived judgment ought to be for the defendant, which the court agreed.——Ibid. 454. pl. 23. Pasch. 27 Car. 2. B. R. the S. C. adjudged for the defendant nisi; And per Cur. if it were a condition in the deed specially recited in the bond, though thereby the mortgage is forfeited, the bond is so too upon non-performance; but being generally to perform all covenants, conditions, &c. according to *Briscoe's case* and *Br. Conditions* 195. it binds only to such as are compulsory, and not to such as are at the party's election to do or not.——Ibid. 460. pl. 35. S. C. adjudged for the defendant unless the plaintiff discontinue.

5. In debt upon an obligation with condition to perform covenants [170] in an indenture of lease, the defendant pleads, that after and before the original purchased, the indenture was by the assent of the plaintiff, and the defendant cancelled and avoided, and so demands judgment if action, and seems by Coke clearly, that the plea is not good without averment that no covenant was broken before the cancelling of the indenture. 2 Brownl. 167. Pasch. 10 Jac. C. B. Anon.

6. If an obligation be for performance of covenants in a grant Raym. 27. which is void, the covenant and obligation are both void; and S. C. adjudged for the defendant. judgment accordingly. Lev. 45. Mich. 13 Car. 2. B. R. *Caponhurst v. Caponhurst*.

7. Condition of a bond was for performance of covenants in a lease Saund. 6. of a dwelling-house to an alien artificer. The court held the bond S. C. but I do not observe S. P. void, for when a bond is to perform covenants, if the lease becomes void by any means, as by release, surrender, &c. the bond there.—— is void also; and it would be absurd, that when the statute 32 H. 2 Keb 116. 8. cap. 16. makes the lease void, and so destroys the contract, that pl. 60. S. C. yet the bond to enforce payment of the rent should remain good; adjudged for the defendant. and judgment for the defendant. Sid. 308, 309. pl. 19. Mich. 18 Car. 2. B. R. *Jevons v. Hardridge*.

8. The defendant in consideration of 400 l. lent him by the plaintiff, granted his lands to him for 99 years, if G. so long live, provided if he pay 60 l. per annum quarterly during the life of G. or 400 l. within two years after his death, then the indenture to be void with a clause of re-entry for nonpayment, and gave a bond for performance of covenants, payments &c. In debt on this bond the breach assigned was, that 30 l. for half a year was not paid at such a time during the life of G. Upon demurrer the court inclined, that this action would not lie on this bond in which there was a proviso, but no express covenant to pay the money, and therefore no breach can be assigned. 2 Mod. 36, 37. Pasch. 27 Car. 2. C. B. *Suffield v. Baskervill*.

(Y. a) [Where] the Condition is to save harms, &c.

[1.] IN an action of debt brought by A. against B. in which C. and D. are bail for B. if the plaintiff hath judgment against B. 270. pl. 355. and the bail, and after C. one of the bail, gives security to A. for all the money due to him; and in consideration thereof, A. promises C. that he may take execution against D. the other bail, and that he will not release
Hob. 269. S. C. adjudged for plaintiff, contra to the opinion of

Hutton; because this condition carried a forcible and apparent intent of saving harm-
 * Fol. 432.
 less of some damage which might arise, not upon the release alone, but upon some external and collateral thing besides the release, and yet by means and occasion of the release; for the words are, to save harmless, &c. from all persons * that might trouble him concerning the said release; and no other person could molest or trouble him for the release of his own debt only, wherein no man could have to do but by means de-hors.
 * [171]

Br. Conditions, pl. 231. cites S. C. for it is in a manner impossible.
 2. If a man be bound to keep me without damage against all men, the condition is void, and e contra if it was against a man certain. Br. Conditions, pl. 150. cites 8 E. 4. 12, 13.

3. In covenant, the defendant had leased to the plaintiff the manor of D. for 20 years, and granted by the indenture that he would acquit him of all charges issuing out of the said manor during the term, and after by parliament the tenth part of the value of the land was granted to the king, and not the tenth part of the issues of the land; for then per omnes the lessor shall discharge the lessee; and by all except Brian the land is charged by reason that he may distrain in the land for the tenth part of the value, and may distrain for his debt, contra of a common person; but Brian e contra, and that the land is not charged, and there is a great diversity between those words, issues of the land, and value of the land; for by the issues of the land, if a man be bound to render them he shall pay the same issues; contra where he is bound to pay only the value. Br. Covenant, pl. 30. cites 17 E. 4. 6.

4. A. and B. were bound to J. S. in 15l. and J. N. was bound to the said A. and B. upon condition to acquit them against the said J. S. and after J. S. released to A. and B. the said 15l. by the labour of the said J. N. this is a good performance of the condition; per Townsend and Catesby, & non negatur. Br. Conditions, pl. 237. cites 1 H. 7. 30.

5. The defendant sold lands, and covenanted to save the vendee harmless upon request. It was said Arg. that if the land was afterwards extended, before any request made, that this was no breach of the covenant, because it was by the negligence of the plaintiff himself. Mo. 189. pl. 338. Trin. 27 Eliz. B. R. Anon.

6. A. made a lease to B. for life, and covenanted for himself and his heirs that he would save the lessee harmless from any claiming, by, from, or under him; A. died, and his wife recover'd in dower, and the lessee thereupon brought covenant against the heir, and adjudg'd

Condition.

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adjudg'd for B. because the wife claim'd under her husband, who was the covenantor; but *if she had been the mother of A. the lessor*, it had been otherwise, because her claim would not be from or under A. Godb. 333. pl. 425. Trin. 21 Jac. B. R. Anon.

(Z. a) *How the Condition ought to be performed, when it is to keep him without Damage.*

[1. IF it be to save him harmless from J. S. if J. S. after says to him, that *if he goes to his house he will beat him*, by which menace he dares not go to his house about his business, the obligation is forfeited. 18 E. 4. 28.]

Br. Conditions, pl. 165. cites S. C. but it is not exactly S. P.
— S. C.

cited 5 Rep. 24. a. 25 held by Brian and Littleton. — S. C. cited Arg. 3 Bulst. 234. and Doderidge J. said, that the matter is well debated in that case. — S. C. cited 2 Bulst. 94 and 105. (115.) — S. C. cited Cro. J. 340. in pl. 5. — The case in Br. Conditions, pl. 165. is, viz. In debt a man is bound to save N. harmless from an obligation in which he is bound to W. S. and after W. S. brought debt against N. by which N. brought debt against his obligor, because he is not saved harmless, and the defendant pleaded quod non damnificatus est; and the plaintiff said, that W. S. brought the action against him, by reason whereof he durst not go about his business, by which he was damnified; and per Choke J. he is not damnified; for if capias be awarded, and he be not arrested, he is not damnified. Contra. per Brian and Littleton, and that the obligation is forfeited for the not saving him from the suit, may be at a loss by the terror. Quere. Br. Conditions, pl. 165. cites 18 E. 4. 27.

[2. If the condition of an obligation be to perform an award, which is, *that the obligee staret acquietatus de qualibet materia contained in a bill in chancery that the obligor hath depending against him, and that the said suit shall cease*, and after the obligor exhibits a new bill in chancery against the obligee for the same matter, and in the end of the bill prays process, but never takes out process there upon against him; this is not any such molestation that it shall be a forfeiture of the condition, for he is not at any damage thereby. Paich. 12 Ja. B. R. between Freeman and Sheene, per Curiam.]

* [172]
Cro. J. 339. pl. 5. S. C. held accordingly, and judgment for the defendant. — 2 Bulst. 94. S. C. adjudg'd per tot. Cur. — Roll. Rep. 7. pl. 9. S. C. ad.

judg'd against the plaintiff. — Brownl. 722. Freeman v. Shield, S. C. and judgment per tot. Cur. for the defendant.

[3. If the condition be to discharge another against J. S. of an obligation in which he is bound, he ought to discharge him of the obligation by release, or otherwise, and it is not sufficient to save him harmless. 22 E. 4. 40. b.]

[4. [But] if the condition be to discharge and save harmless the sureties from the penalty of an obligation; if the obligation be forfeited, yet this condition as to the sureties is not broke, for they may be discharged and saved harmless from the penalty of the obligation notwithstanding. D. 4. 5. Ma. 161. 44. (but it seems the resolution there is contra.)]

[5. If A. and B. are bound in an obligation to perform certain covenants contained in an indenture, of which one is to pay certain money, and C. covenants with A. and B. to save them harmless from all things contained in the said indenture, and after the money is not paid according to the said indenture, by which the obligation is forfeited;

forfeited; yet it seems that C. is not bound to save them harmless from the obligation, for this is a thing collateral to the indenture. Mich. 5 Jac. B. between Scot and Pope plaintiffs, and Griffin defendant.]

Br. Conditions, pl. 34. cites S. C. for the other [6. If the condition be to save harmless from such a thing; this does not extend to actions, in which he might have a lawful defence without the obligor. 2 H. 4. 9.]

Is not bound

to save him harmless against all the world. As in debt upon an obligation the case was, that A. distrained there against B. and B. sued replevin in the county, and C. bailiff of the sheriff returned quod non potuit habere visum averiorum, by which Withernam was awarded of the goods of A. by which C. as bailiff took four beasts of A. in Withernam, and delivered them to the said A. again, and took obligation of A. in which he was bound to him to save him without damage for those four beasts, and B. brought detinue against C. the bailiff, by which he brought debt against A. the first defendant upon the obligation, and the opinion of the court was, that in as much as action of detinue of beasts does not lie against the bailiff who took them in Withernam, therefore the bailiff himself might have barred the plaintiff in the action of detinue, therefore the action does not lie, and also this condition is against law that he should take any obligation to discharge him for re-deliverance of the Withernam again to the defendant; for he ought to have retained it till the first distress was re-delivered if the replevin be in C. B. or to the plaintiff if it be in B. R. and not to re-deliver it to the defendant. Br. Conditions, pl. 34. cites 2 H. 4. 9. — Br. Obligation, pl. 20. cites S. C. and S. P. that he is bound to save him against him only that can hurt him. — Br. Dette, pl. 51. cites S. C. and S. P. accordingly. — Fitzh. Obligation, pl. 13. cites S. C.

Cro. E. 369. [7. If A. and B. are bound in 60 l. to C. and A. binds himself in another obligation to B. upon condition to acquit, discharge, and save harmless the said B. from the said obligation, and after C. sues B. upon the obligation of 60 l. and hath judgment against him upon nil dicit, and after, before execution sued, A. delivers to B. the 60 l. *for which &c. yet his obligation is forfeited, for he hath not acquitted B. as he ought, for he is damnified by the suit and judgment, by which his lands, goods, and body, are subjected to any execution. Hill. 37 Eliz. B. R. between Bopwright and Harvey adjudged.]

— Cro. E.

264. pl. 3. Mich. 33 and 34 Eliz. B. R. Bush v. Ridgely, S. P. adjudged accordingly.

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Fol. 435.

[8. If a man enters into an obligation with another for his debt, of which the condition is to pay the money at a day, and the principal assumes to discharge and save him harmless from the said obligation, and after does not pay the money at the day, by which the obligation is forfeited, and the surety to avoid the suit pays the money; he may have an action upon the case against the principal, for the assumpsit is broke. Hill. 14 Jac. B. R. Crammer and Gomersel adjudged; and the court said it was a stronger case, by reason of the word (discharge,) the exception being in arrest.]

Jo. 197. pl.

10. S. C.

B. leased for

a year the

barn to A.

who put hay

in it, and

after granted

the barn

and hay to

C. and co-

venanted to

warrant it;

[9. If A. lessee of a term rendering rent, assigns it to B. and B. covenants to save A. without damage from all rents payable to the lessor, and after B. leases parcel of the land to A. and after the bay of A. is there distrain'd for rent arrear; yet the covenant is not broke, because the distress of the hay was unlawful, and a trespass, and the sufferance of the rent to be arrear, without actual damage, is no breach of the covenant. Mich. 4 Car. B. R. between Croper and Pollard adjudged upon demurrer, which intratur Tr. 4 Car. Rot. 457.]

The original lessor distrained the hay for rent, whereupon A. brought covenant, but adjudged that it does not lie, because hay in a barn cannot be distrained for rent, and the covenant extends only to lawful and not to tortious incumbrances. Another point was moved, viz. Whether action lies, admitting the distress to be lawful? Jones J. thought it did not; because the covenant extends only to a thing in esse at the time of the covenant made, and not to damage happening to the plaintiff by a subsequent act of his own, viz. his taking the lease for years of the barn; but Crooke *contra*. And judgment was given upon the first point.

(Z. a. 2) To save harmless. At what Time the Suit may be.

1. **A.** Was bound as surety with B. for payment of 20*l.* at Mich. and had a counter-bond from B. to save him harmless. B. paid not the money at the day. A. brought action on the counter-bond. The court agreed that by the non-payment at the day, which has put A. the plaintiff in danger of being arrested, is a damnification to him, and consequently a present breach of the condition, and forfeiture of the counter-bond; and judgment for the plaintiff. 3 Bulst. 233. Mich. 14 Jac. Abbot v. Johnson.

2. If one give a warrant of attorney to confess a judgment for saving bail harmless, tho' the debt be not paid, he cannot sue execution before damnification. Per Cur. 6 Mod. 77. Mich. 2 Ann. B. R. Anon.

3. If one pretending title to land gives security to the tenants to save them harmless on paying him the rent, and after another recovers in ejectment against them, they have not yet a remedy on the security till recovery of the mesne profits, which is from the time of the action brought, and without an actual entry there can be no recovery of the profits. Per. Cur. 6 Mod. 222. Mich. 3 Ann. B. R. Anon.

(Z. a. 3) To save harmless. To what such Condition extends. [174]

1. **D E B T** upon obligation, the condition was that if the defendant kept the plaintiff without damage against J. B. of 10*l.* in which the plaintiff is bound to the defendant by obligation; and per Collowe, Choke and Brian, the condition is void; for * This is J. B. has nothing to do with the debt by obligation which is between the plaintiff and defendant, and so the condition impossible, and so void, and then the obligation is single. Br. Conditions, pl. 175. pl. 23. cites 21 E. 4. * 54. * This is misprinted and should be 53. h

2. Debt upon obligation indorsed, with condition that the defendant shall discharge the plaintiff of all escapes of all felons in the prison of D. and said that there were only 2 there at the time, &c. viz. J. N. and W. S. and that the plaintiff was not damnified, &c. and the other said that he was damnified, &c. Quære, for peradventure he shall be charged of all felons delivered there after. Br. Conditions, pl. 87. cites 21 H. 7. 30.

3. Debt upon an obligation, the condition was, that if the defendant *warrant and defend* an oxgange of land to the plaintiff *against J. S. and all others*, that then, &c. It was resolved per tot. Cur. that the word (defend) shall be taken, and shall not imply any other sense but a defence *against lawful titles*, and not against trespassors. And per Periam J. it would be the same if it had been defend, without the word warrant. Mo. 175. pl. 309. Mich. 26 & 27 Eliz. Grocock v. White.

4. The condition of a bond was to save the obligee harmless *concerning his buying certain goods at such a price*. This extends not to the price, but to the title. Allen 95. Mich. 24 Car. B. R. Smalman v. Hutchinson.

5. Counter-security given against a debt of 4000 l. shall extend to be security against an *after debt* of 2000 l. for which the same person is surety. Ch. Cases, 97. Hill. 19 & 20 Car. 2. Saint-John v. Holford.

Comb. 320. Pasch. 7 W. 3. B. R. Walton v. Spark. S. C. adjudg'd for the plaintiff. 6. Obligation with condition to save the *parish* of S. harmless *from J. G. his wife and children*. Joseph, the son of J. G. born at the time of the obligation entred into, *had a wife and children*, whom he could not maintain, and the parish, by order of the justices, was to allow 2s. per week to Joseph for the maintenance of him and his family; in an action brought upon this bond, the condition was held to be broken, for *tho' it did not extend to grand-children* of J. G. becoming chargeable, yet their father Joseph, who is by nature bound to maintain them, being unable to do it, he is in that respect impotent, and become chargeable to the parish, and he is within the express words of the condition, and held in this case that all the children of J. G. though born after the obligation entred into, would be within the express words of the condition. Skin. 556. Mich. 6 W. 3. B. R. Waltham v. Sparkes.

7. Debt upon bond condition'd to save the plaintiff harmless *against all escapes* which he had *already suffered as warden of the fleet*; the court took a diversity between a bond to save him harmless against all future escapes; for that would be void, and a bond to save harmless against past escapes; for though it was unlawful to suffer them, yet one may contract to indemnify one against a penalty already incurred against law. 6 Mod. 225. Mich. 3 Ann. B. R. Fox v. Tilly.

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(Z. a. 4) To save Harmless. Pleadings.

1. DEBT upon an obligation to keep the plaintiff without damage, the defendant *said that he had performed*, judgment *fi actio*; and the plaintiff *said that he did not keep him without damage*, prist, & non allocatur *without shewing how he is indamaged*; and so he did; quod nota. Br. Conditions, pl. 36. cites 7 H. 4. 11.

2. In audita querela, where a man is bound in a statute upon *defeasance*, that if he acquits or saves indemnified the *conuser* of 10 l. annuity *per ann.* or an annual rent *which he has granted to J. N.* that the

the statute shall be void; and the conusor *said that he had annually paid the said annuity, and so acquitted him, & admittitur pro bono*, as if the payment had been by acquittance, and so see that he is not bound to obtain a release to extinguish the annuity, &c. For the words were, to acquit and save harmless, and *payment is saving harmless*. Br. Conditions, pl. 80. cites 37 H. 6. 18.

3. Debt upon obligation indorfed, that if the defendant acquitted and saved the plaintiff without damage *from an obligation of 10 l. against J. N. to whom the plaintiff was bound in 10 l. that then, &c. and said that such a day and year J. N. redelivered the obligation of 10 l. to the plaintiff at the request of the defendant in lieu of acquittance*. Per Prisot, you ought to say that the plaintiff was not indamaged against J. N. before the delivery of the obligation; for it may be that it was sued by the obligee, by which Laicon said *ut supra absque hoc, that he was indamaged by the said obligation before the delivery of it*; and good. Br. Conditions, pl. 93. cites 38. H. 6. 13.

4. But if he had *said that he had saved him without damages, and did not shew how*, this had been good; but here he shall shew how, viz. by delivery of the obligation; quod nota. Ibid.

5. And it is said 38 H. 8. that ** non damnificatus est* is a good plea; for this in the negative, and therefore good *without shewing how*. But where he pleads that he has kept him without damage in the affirmative, he shall shew how; note a diversity. Ibid.

S. P. and per Keble, there is a diversity where a man pleads in the af-

firmative, and where in the negative; for in the affirmative he ought to plead certain; as where a man is bound to keep J. N. without damage, if he pleads in the affirmative, he ought to plead certain how he has kept him without damage, as by release, payment, &c. in certain. Br. Conditions, pl. 129. cites 4 H. 7. 12. and 5 H. 3. 8.—But where a man is bound to stand to the arbitrement, nullum fecit arbitrium suffices in the negative; but if he pleads in the affirmative, that he has performed the award he shall shew what the award was in certain. Ibid.

• S. P. † But where a man is bound to discharge W. it is no plea that he has discharged him, but shall shew how, because the plea is in the affirmative. Br. Conditions, pl. 135. cites 6 H. 7. 4.— S. P. Ibid. pl. 198. cites M. 37. H. 8. † S. P. Ibid. pl. 240. cites 10 H. 7. 12.

6. Debt upon obligation, upon condition that *if the defendant warrants and defends such land to the plaintiff for life*, whereof he has infeoffed him, that then, &c. and *said that he has warranted and defended*; per Danby this cannot be without impleading the plaintiff, by which he bids him say, *that he was never impleaded, and if he had been, &c. you would have warranted him*, which Littleton agreed. And after Danby and Needham said, that if he had been ousted by a stranger without being impleaded, the obligation had been forfeited, *ratione hujus verbi* (defendet;) quod nota. Br. Conditions, pl. 141. cites 2 E. 4. 15.

7. In debt, a man is bound to save N. harmless *from an obligation in which he is bound to W. S.* and after W. S. brought debt against N. by which N. brought debt against his obligor, because he is not saved harmless; and the defendant pleaded *quod non damnificatus est*, [176] and it is admitted a good plea, and the plaintiff shall shew by replication how he is damaged; quod nota. Br. Conditions, pl. 165. cites 18 E. 4. 27.

Condition.

8. Debt upon obligation, with condition that the defendant shall keep the plaintiff without damage from all suits which J. S. has against him, and the defendant said *quod querens non est damnificatus* by the said suits; per Brian and Choke J. the defendant ought to shew that he has saved the plaintiff without damage, or has been nonsuited, &c. or has discontinued them, &c. in the generalty, and the plaintiff shall shew certain in what action he is grieved; *quod non negatur*; *quod nota*. Br. Conditions, pl. 178. cites 21 E. 4. 75.

9. If A. be bound to B. to discharge and save him harmless, if A. pleads that he has discharged him, he shall shew certainly how; but if he was bound only to save him harmless, then the plea is good generally, per Catesby; *quod non negatur*, & hoc videtur dicere non damnificatus est. Br. Conditions, pl. 185. cites 22 E. 4. 43.

10. Condition was, that the obligee should peaceably enjoy, &c. and the defendant pleaded, that the plaintiff did peaceably continue his possession until such a day, at which time the lord distrained for rent; and a good plea. Heath's Max. 47. cites 28 H. 8. D. 30.

11. But where the condition was, to grant warrant and save harmless against lord and king, and to have and peaceably enjoy, the defendant pleaded, *quod & habuit & pacifice gavisus fuit*; where said by divers, that the plea is ill, and but argumentative, that is, he hath peaceably enjoyed the land; ergo, he hath warranted the land, and saved the plaintiff harmless, for he might be impleaded in a *præcipe* and the other not warranted, and yet hold it peaceably, or might be distrained for issues lost, &c. and therefore ought to have pleaded expressly *quod non fuit damnificatus per regem nec per aliquem alium*; or that the plaintiff was impleaded, and he did warrant, &c. *Quare inde*, for Baldwin e contra. Heath's Max. 47. cites 30 H. 8. D. 43.

12. The condition of an obligation was, to warrant, defend, or save harmless, as well the person of the obligee as the premises against one C. where the defendant alleged in his bar a former lease, by reason whereof *neque le obligee, nec les premises possint nec potuerunt esse damnificat' per prædictum C.* The defendant replied the special matter in law, without concluding *et issint damnificatus*; it was holden the defendant's bar was ill, and that he ought to have pleaded *non fuit damnificat'*, or the special matter, and conclude *issint non damnificatus*; and the plaintiff's replication, for want; a proper conclusion, is ill also. Heath's Max. 47, 48. cites 2 El. D. 184.

13. And in the like case, the defendant pleaded *quod quer' non damnificat' fuit per A.* and the plaintiff in his replication shew'd a special damage, and concluded *et issint damnificat'*, and the defendant by his rejoinder pleaded, *nul tiel record*; *quod nota*. Heath's Max. 48. cites El. D. 186.

14. Debt upon bond to save the plaintiff harmless, &c. The defendant pleaded in bar that he had saved him harmless generally. The plea was held ill; for he should have pleaded non damnificatus, because he may save the plaintiff harmless in some things, and yet he may be damnified in some other things, in which the defendant was

was bound to save him harmless; and judgment nisi. Style 16. Pasch. 23 Car. B. R. Wroth v. Elsey.

15. Bond to save harmless from bonds, or to satisfy all damages within a month, defendant *pleaded* he had paid him such a sum for all his charges within a month, adjudg'd that defendant ought to *shew how* the plaintiff was molested, and that he had satisfied so much, or that he was not molested. Cro. E. 393. pl. 18. Pasch. 37 Eliz. C. B. Hutchinson v. Lewson.

16. Debt on bond to save harmless from payment of rent due to a stranger at such a feast; 'tis no plea to say that no rent was due, but ought to plead *non fuit damnificatus*. Savil 90. in pl. 167. Hill. 30 Eliz. [177]

17. Debt upon a bond, the condition was to secure him harmless against J. S. in an action for 53 l. for which he was bail for him. The defendant *pleads* he had paid to J. S. 20 l. in satisfaction of the 53 l. and so he kept him harmless; but for that the plaintiff might be damaged before the payment, to which he does not answer, the plea was held ill, and the plaintiff had judgment; cites 38 H. 6. 13. Cro. E. 156. pl. 40. Mich. 31 & 32 Eliz. B. R. Davies v. Thomas.

18. In debt on bond condition'd that *whereas the plaintiff was bound in 200 l. for the defendant for payment of 100 l. to A. B. if therefore the defendant shall save and keep harmless the plaintiff from all suits, quarrels and demands touching &c. the said bond &c. that then &c.* The plaintiff declared that *at the day he went to the place, and finding no body there to pay the money, he paid it himself &c.* The defendant *pleaded non fuit damnificatus*. The plaintiff replied, and *shew'd* the special matter. Adjudg'd for the plaintiff; for the payment of the 100 l. is damage, and had he not paid it greater damage would ensue; and it is not necessary that the plaintiff be arrested or sued &c. 5 Rep. 24. a. Mich. 42 & 43 Eliz. B. R. Broughton's case, alias Broughton v. Pretty. S. C. cited Cro. J. 340. in pl. 5. S. C. cited 2 Bull. 115.

19. Debt upon bond for performance of covenants brought by the high-sheriff against the under-sheriff; one covenant was, that the under-sheriff shall keep all prisoners committed to him until they be delivered by law, and also to save the plaintiff harmless of all escapes made by them. The defendant *pleaded* performance of all covenants. The court held the plea ill, because one part is in the affirmative, and the other in the negative, and therefore he ought to have *pleaded non fuit damnificatus*. Goldsb. 157. pl. 88. Hill. 43 Eliz. Payton's case.

20. Obligation with condition, reciting that whereas A. the plaintiff, at the request of the above-bounden B. the defendant, stands bound together with the said B. unto one J. S. in an obligation for payment of 10 l. on the 15th May (which May was before the date of the said obligation whereof the action is brought) if the said B. do save and keep harmless the said A. of and from the said obligation, that then &c. B. *pleaded payment secundum formam et effectum conditionis prædictæ*. Upon demurrer the plaintiff had judgment; for B. should have *pleaded non damnificatus*. Gould. v. 159. pl. 90. Hill. 43 Eliz. Allen v. Abraham.

Yelv. 25.
S. C. but
S. P. does
not appear
—Noy
47. S. C.
but S. P.
does not
appear.

21. Case &c. for that *in consideration the plaintiff would discharge the defendant, then under an arrest, the defendant promised to pay so much &c. and alleged quod exoneravit eum from the said arrest*, but did not shew how, but upon this being assigned for error, the court held it well enough; for it need not be pleaded, as a discharge from a bond or rent must, because they cannot be discharged but by deed, and it ought to be an absolute discharge; but discharge of an arrest may be by composition for a time, either with the party or the sheriff &c. and so need not be shewn, and so judgment was reversed. Cro. E. 913. pl. 2. Hill. 45 Eliz. B. R. King v. Hobbs.

Yelv. 30.
S. C. and
the cove-
nant was,
that he
should en-
joy it with-
out lawful
disturbance
of any, and
because the
plaintiff did
not shew

22. Covenant for that the testator sold to the plaintiff 20 ton of copperas, and agreed with the plaintiff that *if he failed of payment of such a sum at such a day, that then he might quietly have and enjoy the said 20 ton of copperas*, and shewed that the money was not paid at the day, and that he could not have nor enjoy the said 20 ton of copperas; but because it was that he could not have and enjoy, and did not shew how and by whom he was disturbed, it was held insufficient, and adjudged for the defendant. Cro. E. 914. pl. 4. Hill. 45 Eliz. B. R. Chantflower v. Priestley.

that he was legitimo modo disturbed, according to the very words of the covenant, it was * held ill; for tho' the plaintiff in covenant need not shew specially the title by which he is disturbed, because by presumption he may not know it, yet in assigning the breach he ought to pursue the words of the covenant. —Noy 30. Chantflower v. Waterhouse and Presbye, S. C. adjudged against the plaintiff. —Vaugh. 121. S. C. cited by Vaughan Ch. J. as resolved by the whole court.

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23. Debt upon bond, conditioned *to save harmless from all obligations which he had entred into for him*. Defendant pleaded *quod exoneravit & indemnem conservavit from all the obligations*. Exception was taken, because he did not shew from what obligations; sed non allocatur; because there might be many, and so to avoid prolixity; but because he did not plead *quo modo he discharged him*. It was held to be ill; et adjournatur. Cro. E. 916. pl. 6. Hill. 45 Eliz. B. R. Braban v. Bacon.

24. Debt on a bond (reciting a sale of an advowson to the plaintiff) conditioned *to acquit, discharge, and save the plaintiff harmless from all bargains, incumbrances, statutes, charges &c.* The defendant pleaded, *that he saved harmless the plaintiff and the advowson from &c. as in the condition*. Adjudged an ill plea, because he did not shew how he discharged him, for he ought to shew it particularly. Cro. J. 165. pl. 1. Trin. 5 Jac. B. R. Allington v. Yearkner.

Yelv. 207.
S. C. held
accordingly,
per tot. Cur.
—Bulst.
155. S. C.
adjudg'd ac-
cordingly
for the
plaintiff.

25. Assumpsit *in consideration the plaintiff, at the request of the defendant, was bound with him in a recognizance for his appearance at the next assizes*, he the said defendant promised *to save him harmless &c.* The defendant pleaded, *that he brought a certiorari directed to the justices of gaol-delivery, and 10 March &c. the writ was delivered to them, who allowed it*, but adjudged no good plea; for he ought to have appeared, and to have had his appearance recorded, otherwise his promise is broke; besides, he did not allege that he had delivered the writ at the next assizes, and then the purchasing is not material; besides, no place is alleged where he delivered the writ.

writ, and that is issuable, and where the assizes were holden for the county of Suffolk is not shewn, and therefore adjudg'd for the plaintiff. Cro. J. 281. pl. 2. Trin. 9 Jac. B. R. Rolfe v. Pye.

26. In debt on a counter-bond the defendant pleaded *non damnificatus*; the plaintiff replied, that the money was not paid, and that a *capias* was taken out against him for the same, and so he was damaged. Adjudged to be a clear breach, and judgment for the plaintiff. 2 Bulst. 115. Trin. 11 Jac. B. R. Reeve v. Harris.

27. In debt on bond conditioned to save the plaintiff harmless for being his bail, the defendant pleaded *quod libere & absolute exoneravit a prefato ballio*. Adjudged that he ought to shew how, and for want thereof the plea was held not good, and judgment for the plaintiff. 2 Bulst. 270. Mich. 12 Jac. B. R. Codner v. Dalber.

Cro. J. 363. pl. 24. Codner v. Dalby, S. C. adjudg'd accordingly for the plaintiff;

for always when one pleads a discharge, and that he saved the plaintiff harmless, he ought to shew how, that the court may adjudge thereof; but he may plead generally *non damnificatus* without shewing how, because he pleads in the negative, and the other ought to shew damnification. Cro. 363. pl. 24. Mich. 12 Jac. B. R. Codner v. Dalby. ——— S. P. Jenk. 110. for a jury cannot judge of facts uncertain general pleas; the general issue of *non damnificatus* being waiv'd, such general plea, and the issue taken upon it perplex the jury.

28. In covenant brought to discharge the plaintiff of a single bill, in which he was bound for the debt of the defendant; he alleges for breach non-payment, and a suit, and recovery at law for the money which remained in force. The defendant pleaded that he paid the money at the day, and thereof gave the plaintiff notice before the purchasing his writ. The plaintiff demurs; the court held the plea naught, and judgment for the plaintiff. Brownl. 24. Hill. 13 Jac. Rident v. Took.

29. The defendant leased to the plaintiff an house for 2 years, in consideration whereof the plaintiff promised to pay for the lease 26 l. and the defendant thereupon promised to discharge and save him harmless of all charges and incumbrances. The breach was assigned that one M. E. distrained his beasts in the said close for 20 l. for which the said close at the time of the distress was lawfully charged, and was liable to and impounded &c. till he was forced to pay the said money. But because he did not shew that there was any charge before due, nor by whom granted, and it might be charged by the plaintiff himself after the lease made, and so is in no express charge upon this promise, it was held to be ill per tot. Cur. and adjudg'd for the defendant. Cro. J. 444. pl. 21. Mich. 15 Jac. B. R. Leigh v. Gotyer.

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30. The defendant, 1 Car. promised the plaintiff that he should enjoy such lands in possession, and that he would save him harmless concerning any action and suit against him for them, and shewed he was ousted of the possession by M. 1 July, 3 Car. and that a good recovery was had against him in an *ejectione firmæ* 2 Car. and damages and costs to 7 l. by reason whereof he feared to be arrested, and that he gave defendant notice thereof, and requested him &c. The court was of opinion because the defendant failed in part of the breach of the assumpsit, viz. in not saving harmless, but suffered the judgment to remain in force, by reason whereof the plaintiff was in danger of being arrested, that therefore the plea was ill, and judgment

Jo. 329. pl. 2. S. C. adjudged for the plaintiff.

ment was for the plaintiff. Cro. C. 349, 350. pl. 13. Hill. 9 Car. B. R. Peck v. Ambler.

31. Debt upon bond, reciting whereas the plaintiff and one H. were bound in another bond to perform covenants in an indenture; now if the said H. should perform the said covenants, and also if the defendant should save the plaintiff harmless of that bond, then &c. The defendant, upon oyer of the condition, pleaded, that H. had performed the covenants, and saved the plaintiff harmless of that bond. Upon a general demurrer this plea was adjudged ill, because he did not set forth the covenants in the indenture, and some of them might be in the negative, and also because he did not set forth how he had saved the plaintiff harmless. All. 72 Hill. 23 Car. Ellis v. Box.

32. Covenant, for that the defendant, the lessor, covenanted to save the lessee harmless against all suits, evictions, and expulsions. The defendant pleaded that J. S. ousted him by an habere facias possessionem; upon demurrer this plea was ruled to be ill, because he had pleaded an expulsion by an execution without shewing any judgment, whereas he should have set forth the ejectment and the proceedings to the judgment, and he ought to have shewn that J. S. had a legal title before the lease in ejectment made, and perhaps the recovery might be by a lease made by the plaintiff himself, Lev. 83. Mich. 14 Car. 2 B. R. Nicholas v. Pullin.

Bid 444.
pl. 1. S. C.
adjudg'd ac-
cordingly.
—2 Saund.
83. S. C.
adjudg'd ac-
cordingly.
—2 Keb.
6:2. pl. 53.
S. C. the
court in-
elined that
it was a de-
parture; sed adjournatur.—Ibid. 619. pl. 7. S. C. adjudg'd for the plaintiff.

33. In debt on bond, conditioned to save a parish harmless from the charge of a bastard child, the defendant pleaded non damnificatus; the plaintiff replied that the parish laid out 3s. for keeping the child. The defendant rejoined that he tender'd the money, and the plaintiff paid it de injuria sua propria. Twisden J. said that the rejoinder is a departure, and that they should have pleaded thus, viz. that non suit damnificatus till such a time, and then you offer'd to take care of the child, and tender'd &c. Judgment for the plaintiff nisi &c. Mod. 43. pl. 97. Hill, 21 & 22 Car. 2. B. R. Richards v. Hodges.

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34. W. promised B, the plaintiff to save him harmless concerning goods bought by him of W. Breach alledged was, that J. S. brought an action of trover for the said goods, and declared that he was possessed of those goods before W. sold them to B. ut de bonis suis propriis &c. and recovered them. After verdict exception was taken, because it was not alleged that B. gave W. the defendant notice of this suit; sed non allocatur; for notice is not alleged in any of the precedents. And per Windham, where a thing lies particularly and solely in the notice of the party that is to take advantage, there he shall allege notice, but here he may have notice from the party, or may have notice from him that recovered the goods. Freem. Rep. 130. pl. 152. Mich. 1673. C. B. Bloxam v. Warner.

35. A second objection was, that it was not alleged that the recovery was by an eigne title, the court said that did appear in the record, and so it was well enough; for it is alleged, that J. S. who recovered them lays a property in himself the 12th of April before the sale, and so it must necessarily be eigne to the plaintiff's title, and so judgment

judgment was given for the plaintiff. Freem. Rep. 131. pl. 152. Mich. 1673. C. B. Bloxam v. Warner.

36. In debt upon a bond conditioned to save the obligee harmless from another bond, the defendant pleaded *non damnificatus*. The plaintiff replies, that the money was not paid at the day, and he *devenit onerabilis*, and could not attend his business for fear of an arrest. The defendant rejoins, that he tendered the money at the day, *absque hoc* that the plaintiff *devenit onerabilis*, to which it was demurred, and judgment was given for the plaintiff; for the money not being paid at the day, the counter-bond is forfeited, and the traverse in this case is naught. Vent. 261. Trin. 26 Car. 2. B. R. Anon.

37. In covenant &c. to save the plaintiff harmless as to the occupation of certain closes &c. the breach assigned was, that the defendant non indempnem conservavit ipsam de & concernente occupationem quorundam clausorum, for that T. S. commenced a suit against him &c. concernente occupationem clausorum prædicti, but did not set forth that T. S. had any title, sed per Curiam, this being after verdict; and the plaintiff setting forth in his declaration, that T. S. recovered, the court were all of opinion that judgment should be given for the plaintiff. 2 Mod. 213. Pasch. 29. Car. 2. B. R. Major v. Grigg.

Lev. 194. Gregory v. Major S. C. the court said, that this agreement was only as to the possession, and not as to the title, and gave judgment for the

plaintiff. — 3 Keb. 744. pl. 12. Gregory v. Mayo, S. C. adjudged for the plaintiff nisi. — Ibid. 755. pl. 34. S. C. & S. P. held accordingly by Wild and Jones.

38. Bond was conditioned to save harmless T. S. and the mortgaged premises, and to pay the interest for the principal sum; the defendant pleads, that T. S. non fuit damnificatus, for that he (the defendant) had paid the principal and interest due at such a day. Upon a demurrer this plea was adjudged ill, because *non damnificatus* goes to the person of T. S. and not to the premises. 2 Mod. 305. Pasch. 30 Car. 2. C. B. Shaxton v. Shaxton.

39. Debt upon bond conditioned to save the plaintiff harmless from a bond in which he was bound for the defendant, being a collector of the rents of the new-river-water company, that he should pay the money collected within 20 days after he should be required; the defendant pleaded *non damnificatus*; the plaintiff replied, that the defendant had received 1300l. and that he had not paid it according to the condition, whereupon he was threatened to be arrested, and so was compelled to agree with the company and pay them 250l. And upon demurrer to this replication it was objected, that the breach was not well assigned, because it did not appear that the defendant had received the 1300l. twenty days before the action brought. The whole court held the exception good, and judgment for the defendant; but afterwards the plaintiff had leave to amend his replication. Lutw. 470. Hill. 3 & 4 Jac. 2. Ball v. Richards.

40. Debt upon bond, conditioned to acquit, discharge, and save harmless the parish from a bastard child, the defendant pleaded *non damnificatus* generally; and upon demurrer it was objected, that the defendant ought to shew how he acquitted and discharged the parish, and not answer the damnification only; but it was answered, that had the plea been that he had kept harmless and discharged the parish

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parish it had not been good, without shewing how, &c. because it is in the affirmative, but here it was *in the negative*, (viz.) that the parish was not damnified, and they should have shewn a breach; for though in strictness this plea does not answer the condition of the bond, yet it does not appear upon the whole record that the plaintiff was damnified, and consequently he has no cause of action; and the court gave judgment for the defendant. 3 Mod. 252. Mich. 4 Jac. 2. B. R. Mather v. Mills.

Carth. 374.
S. C. adjudged accordingly. If one be bound to save harmless against a particular thing, the defendant ought to shew how he has done it; but if it be to save him harmless generally a non damnificatus generally will do; and if it be to save harmless in several particulars against all persons it is general; per Holt Ch. J. 12 Mod. 406. Trin. 12 W. 3. Anon.

41. In debt upon a bond, conditioned to free and keep the plaintiff harmless of, and from, *all costs and damages which may arise by reason of such a law-suit &c.* The defendant pleaded *non damnificatus* generally, and upon demurrer the court held the plea good, because the condition was to save him harmless from some thing which was *uncertain at the time of the making thereof*, (viz.) from the costs and charges of the suit, that no costs might be recovered against him; but if it had been to save him harmless from a *particular and certain thing*, there such a negative plea generally would not have done without shewing how he had indemnified the other. 5 Mod. 243. Mich. 8 W. 3. Harris v. Pett.

* The case of Acton v. Hill. Mich. 33 & 34. Eliz. B. R. pl. 24. per Gawdy, that if the discharge is to a particular thing, he must shew how, &c. but otherwise when it is to a multiplicity of things; for then a general pleading is good, and cites 5 E. 4. 8.

42. Bond to save harmless *against several particular things, and after in general*; here to a general declaration *non damnificatus* is a good plea, and then the plaintiff should shew a breach, though perhaps it is better to answer to the particular things, and then to say *quoad the rest non damnificatus*; per Holt Ch. J. 11 Mod. 78. pl. 11. Pasch. 5. Annæ B. R. Anon. cites * Cro. E. 253. that the plaintiff should have assigned a *particular breach* before he had demurred.

per Holt Ch. J. 12 Mod. 406. Trin. 12 W. 3. Anon.

(Z. a. 5) To save harmless. Equity.

So 'tis a breach of condition at law. 3 Bulst. 234. Abbots v. Johnstons.

1. **THO'** the surety is not troubled or molested for the debt, yet at any time after the *money becomes payable* on the original bond, the court of chancery will decree the principal to discharge the debt. Vern. R. 190. Mich. 1683. in case of E. Ranelagh v. Hays.

2 Chas. Cases 146. S. C. decreed, but says it was much opposed by Mr. Keck, and in a nota says it was not charged in the bill

2. The plaintiff assigned *several shares of the excise* in Ireland to the defendant, who thereupon covenanted to *save him harmless, and to stand in his place touching the payments to the king, &c.* the plaintiff being sued by the king, brought his bill to have the agreement performed in specie; it was insisted, that the plaintiff might recover damages at law, and that this was no specific covenant, but only a general and personal covenant for indemnity, and it sounds only in damages which cannot be ascertained in chancery; but lord North decreed that the defendant should perform his covenants, and directed it to a master, and that as often as any breach should happen

* [r82]

happen he should report the same specially, that the court, if occasion should be, might direct a trial in a *quantum damnificat*. Vern. 189. pl. 190. Mich. 35 Car. 2. lord Ranelagh v. Hayes.

here, or proved that the rent was behind, but only

that he was sued, &c. and objected, that for every petty breach this would subject the defendant to commitment.

3. A diversity was taken, viz. where the counter-bond or covenant is given to save harmless from a penal bond *before the condition broken*, there if the penal sum be not paid at the day, and so the condition not preserved, the party by this is liable to the penalty and so *damified*, and the counter-bond forfeited; but if the counter-bond be given *after* the condition broken, or to save harmless from a *single bond* or bill without a penalty, there the counter-bond cannot be sued without a special damnification; per Holt Ch. J. 1 Salk. 197. pl. 2. Mich. 5. W. and M. in B. R. Griffith v. Harrison.

4 Mod. 249. S. C. but same diversity does not appear. Skin. 397. pl. 31. S. C. but S. P. does not appear.

(A. b) Conditions. [*What a Breach.*] In respect of the Words.

[1. If the condition be, that *if he recovers 20 acres of land, the obligee shall have a moiety*; if he recovers but 10 acres, he is not bound to pay any part. 21 Ed. 4. 52. b.]

[2. If the condition be, *to make before Easter next a sufficient estate in fee of the manor of B. discharged of all former bargains and incumbrances, except a lease for years*, upon which the ancient rent is reserved; if a *lease for years* be made *mesne between the date of the covenant, and the delivery of the deed*, this is not any breach. D. 3, 4. Ma. 139. 34. the ancient rent being reserved.]

This seems to have been a case in Cam. Scacc. or at one of the serjeant's inns, and was held by Brooke Ch.

Baron, Saunders, Whiddon, and Dyer, that it was not a breach; but Morgan and Bendlowe contra; and was the case of the earl of Huntington v. Ld. Clinton.

3. If the condition of the feoffment be, *that the feoffee shall give other lands in recompence thereof, and the feoffee infeoffs him of other lands of a defeasible title, which are after evicted*; yet the condition is performed; for *once a recompence, and perpetually*. D. 3, 4. Ma. 139.]

* D. 139. a. pl. 32. Hill. 3 & 4 P. & M.

[4. If the condition be, that *if the conusee of a statute holds such lands in peace without damage or loss for want of warranty, then, &c. if the conusee be impleaded, and vouches the conusor, who renders it, by which the land is lost, and the conusor hath nothing to render in value*, the condition is broke; for to render in value is of common right upon a warranty, and the judgment to recover in value is not sufficient, for he is indamaged without the value. 46 Ed. 3. 28. b. such case.]

Br. Conditions, pl. 227. cites S. C. & S. P. by Finchden and Per. 34.

[5. If the condition be *to acquit another*, though he acknowledges the acquittance, yet if he do not *acquit him in deed*, the condition is broke. 46 Ed. 3. 28. b.]

[6. If the condition be *to stand to an award de partitione faciend'*, and they *award a partition*, and that he shall levy a fine to make it certain; he ought to levy a fine, because this depends upon the partition, and *inforces it.* 11 H. 4. 25. b.]

† This seems to be misprinted; for I do not find any such point there. * [7. If the condition be *not to alien the land*, and he gives the land to his heir apparent, without taking of any thing for it, the condition is broke. † 46 Ed. 3. 33.]

† This seems to be misprinted; for I do not observe any such point there. [8. If the condition be *not to do any thing which shall turn him in villeny*; if he acknowledges a statute, whether the condition is broke? Dubitatur † 46 Ed. 3. 32. b. (Quære, the intent of the word villeny.)]

[9. If the condition be *not to make any debate or disturbance about the administration of the goods of B.* against the obligee; if he administers the goods, and causes himself to be summoned for them, the condition is broke. 47 Ed. 3. 23. b.]

[10. If the condition be *to suffer an assise to pass*, which the obligee hath against another; though he gives 20 s. to a juror to pass against him, yet if the assise pass for him, the condition is not broke. 10 H. 6. 19.]

* Orig. is (make engine.) [11. But otherways it had been if the condition had been to suffer the assise to pass without impediment * or had endeavours. 10 H. 6. 19.]

Br. Conditions, pl. 35. cites S. C. and the covenant was, that the lessor may come to the house leased at a certain time, and that the lessee do not oust him during the term; if the lessor comes, and the lessee shuts and locks the doors, yet this is no ouster, for he might have entred notwithstanding. 3 H. 4. 8. b. adjudged.]

be in the house 4 days in the year, and that the fastening the doors and windows is no breach; and Brooke says, that the law seems to be the same of such a condition. — Br. Dette, pl. 56. cites S. C. — Fitzh. Dette, pl. 109. cites S. C. adjudg'd by all the justices.

[13. If a man leases for years, and covenants, that the lessee shall enjoy the land peaceably, without the trouble or molestation of any, and there was a rent-seck at the same time issuing out of the land, which was due to the queen, and after the queen by her prerogative distrain'd in the land; yet this is not any breach of the covenant, for the land is not charged or incumbered with the rent-seck, scilicet, as to the possession; and then when the queen distrains for it by her prerogative, this is of common right, and none is bound to discharge things of common right. Mich. 43. 44 Eliz. B. R. between Herle and Howe, per Curiam.]

[14. So a fortiori if the rent had been issuing out of other land. Ibid. per Popham.]

S. C. cited D. 6. b. Ma. B. pl. 5. [15. Lease to baron and feme for years, with a proviso that if the possession comes into the hands of any other than the baron and feme, and of their issue, that then upon the tender of 100 l. by the lessor, he may re-enter. Baron dies; feme takes another baron; lessor tenders

tenders the 100l. Whether the marriage is a breach, dubitabant. Mo. 21. pl. 71. Hill. 2 Eliz. Anon.

16. A. by indenture leased an house to B. for 40 years, and B. by the same indenture, covenants that he will sufficiently repair it during the term, and that A. his heirs and assigns may enter every year to see if the repairs are done; and if it is repaired, upon view of the lessor, according to the agreement, then the lessee shall hold for 40 years more after the first term ended &c. It was agreed by all but Rastal, that though the lessor does not view &c. yet if it is kept in repair the lessee shall hold the other 40 years, the reparations being in fact performed, because the view is a thing voluntary in the lessor, and for his benefit, and the not doing thereof shall not prejudice the lessee; and judgment for the plaintiff by the other 3 justices. Mo. [184] 27. pl. 88. Trin. 3 Eliz. Skern's case.

17. If a man be bound to make a feoffment of this land there, altho' he charges the land, yet he shall not forfeit his bond; but if it were to make a feoffment of his land discharged &c. it is otherwise; but yet he shall not be bound to discharge it of such things with which it is charged by the law. Arg. 3. Le. 44. pl. 64. Mich. 15 Eliz. C. B. in case of Mountford v. Catesby.

18. The Bishop of Rochester made a lease of a manor for years, wherein were divers copyholders, proviso that the lessee shall not molest, vex, or put out any copyholder paying his duties and services such *pæna forisfacturæ*; the breach was assigned that the demandant entred upon a copyholder, in a cow-house, parcel of the premises, and beat him, et sic molestavit; it was the opinion of the court, that the condition was not broken, for that the molestation ought to be intended such as should be an expulsion, or molestation concerning his copyhold-tenement; and adjudged accordingly. Cro. E. 42. pl. 16. Mich. 37 & 38 Eliz. B. R. Penn v. Glover.

Mo. 402. pl. 533. S. C. stated only as by way of covenant, and without any proviso, adjudg'd no breach; and the court likewise inclined that it was no condition.

19. A. leased lands for years, rendring 50s. rent at the 4 feasts, viz. Mich. &c. Proviso if the rent be behind by the space of a year after the day of payment, it being lawfully demanded, and no distress to be found there per totum tempus prædictum, to re-enter; it was found that the rent was behind for a year, and that there was a demand, but there was not any distress the last day of the year upon the premises, and that the lessor entred. Adjudged that the condition was not broken if there was a distress at any time of the year, and a condition shall be taken favourably for the lessee. Cro. E. 764. pl. 2. Trin. 42 Eliz. B. R. Grig v. Moyfes.

20. The condition of a bond to save the obligee harmless concerning his buying of certain goods at such a price, extends not to the price but the title, as was clearly agreed upon evidence between them. All. 95. Mich. 24 Car. B. R. Smalman v. Hutchinson.

21. Lease for 9 years, was dated 1 June, 16 Car. 2. in which there was a covenant to save the plaintiff harmless from all evictions during the term, and in covenant the breach assigned was an eviction 26th of June following; the defendant pleaded that this lease was primo deliberatum the 1st of June 17 Car. 2. which was after the breach assigned, and that the plaintiff was not ejected after the delivery of the deed. Upon demurrer the court held that those words during

2 Keb. 291. pl. 73. S. C. adjudg'd for the plaintiff. — Ibid. 377. pl. 38. S. C. adjudg'd accordingly.

(during the term) shall be construed during the term in computation of time, and not only from the time of the delivery of the deed when it commenced in interest, and judgment for the plaintiff. Sid. 374. pl. 14. Trin. 20 Car. 2. B. R. Lewis v. Hiliard.

(B. b) How to be performed when it is Pro Confilio impendendo [&c.]

● Br. Annuity, pl. 7. [1. IF an annuity be granted to a man of the law, pro confilio impendendo, the grantee is not bound to travel, nor do any thing, but counsel where he may be found. * 41 Ed. 3. 6. † 8 H. 6. 24. ‡ 21 Ed. 3. 7. b. adjudged.]

Fitch. Annuity, pl. 19. cites S. C. & S. P. ——— Br. Extinguishment, pl. 35. cites S. C. ——— † Br. Annuity, pl. 18. cites S. C. ——— ‡ Br. Conditions, pl. 45. cites S. C. & S. P. adjudged. ——— Br. Annuity, pl. 18. cites S. C.

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Br. Annuity, pl. 7. [2. Also the grantor ought to disclose his case to the grantee, otherwise he is excused of his counsel. 41 Ed. 3. 6. b.]
cites S. C. and 41 E. 3. 19. ——— Fitch. Annuity, pl. 19. cites 41 E. 3. 19. S. P.

[3. If the grantee cannot counsel him, yet if he does as much as he can, he is excused. 41 Ed. 3. 6. b.]

Br. Annuity, pl. 7. [4. So if any annuity be granted pro confilio & auxilio to a physician, the grantee is not bound to travel for him, but to give his advice and help where he may be found; also he ought to certify him what malady it is. 41 Ed. 3. 6. b. 20. (R. Quære this; for a malady is secret, which cannot be known but by the physician, and a sick man cannot travel to the physician, but perhaps if he sends his urine to him, he may know his disease; but he may be helped much by inspection and feeling his pulse; ideo Quære.)]
cites S. C. and 41 E. 3. 19. ——— Fitch. Annuity, pl. 19. cites 41 E. 3. 19. and seems to admit that the physician ought to go to the patient.

Nor is he bound to go to him; nor the grantor may notify him, and he may give his counsel, where he is, without going to him; though otherwise it is in case of apprehension; for the patient cannot go to him. Br. Annuity, pl. 7. cites 41 E. 3. 6. 19. ——— Fitch. Annuity, pl. 19. cites S. C. ——— See (S. c) pl. 20.

[6. So he is not bound to go with him, though the other will bear his charges. 8 H. 6. 24.]

Cur. J. 482. [7. If an annuity be granted pro confilio impenso & impendendo to a counsellor, he is not bound by this to put his hand to a bill in the star-chamber. Pasch. 16 Jac. B. R. between *Abingry and Hammond* adjudged per Curiam.]

and held no plea; for setting his hand to ever bill may be inconvenient to him.

[8. But

[8. But when annuity is granted *pro consilio impendendo*, and the * grantee in the same deed binds himself by such words, *pro qua quidem concessione*, that he will go with him to any place within the country; there he ought to go with him, because he hath specially bound himself so to do. * 8 H. 6. 24. 32. Ed. 3. Annuity, 30 Curia.]

this is a condition, and for non-feasance the annuity is extinct, per Strange.—Br. Annuity, pl. 18. cites S. C. & S. P. by Strange. But Brooke says, quere inde, for it is a grant, and not a condition.

[9. If the grantee of such annuity refuses to give his counsel upon demand, the annuity is determined. * Da. 12. 1. b. † 8 H. 6. 24. 16 Ed. 3. Annuity 22. 5 Ed. 2. Annuity 44.]

Litt. 244. a. S. P.—Because he has no remedy for the counsel, nor any estate therein, Arg. Roll. Rep. 222. Hill. 12 Jac. B. R. † Br. Annuity, pl. 18. cites S. C. & S. P.—Br. Extinguishments, pl. 53. cites S. P.—In the quarto edition, and the smaller folio edition, it is pl. 96. and so in those two editions are two pleas mark'd (36) and those last mentioned editions cite 48 E. 3. 6.—Co. Litt. 204. a. S. P.—So if annuity be granted, quod prestaret consilium, this makes the grant conditional. Ibid.

[10. If the grantee of an annuity *pro consilio impenso & impendendo* refuses after to give counsel; this does not determine the annuity, because this was granted as well for the services past as those to come. Temp. Ed. 1. adjudged.]

shall not extinguish the annuity.

[11. If a dean and chapter grants to another the office of chief cook, with 5 l. for the exercise thereof, provided that he exercises the office in the great kitchen of the church; and after the dean requires him to exercise it in his own kitchen, and he refuses, yet the annuity is not determined. Hill. 37 Eliz. B. between Salisbury, dean of Norwich, and Chapman, adjudged.]

I. In replevin E. avowed for a rent-charge granted to him by a stranger, who was seised of a manor whereof the land where is parcel &c. *pro consilio impendendo*. It was pleaded in bar, that E. the defendant was attainted of treason, and committed to the tower, and that the grantor had occasion for to have his counsel, and could not have access to him &c. and upon demurrer all the court held that the avowant shall have return; for by the attainder the rent was not forfeited, because it was incident to the cause for which it was given, nor can be granted over, and tho' E. is in prison, yet he may give counsel as well as before, and no default is assigned in him. D. 1. b. 2. a. Mich. 6 H. 8. Oliver v. Empson.

II. If annuity be granted to a counsellor or physician for their lives, *pro consilio suo impendendo* to the grantor, and the grantor dies, this does not determine the annuity, but the grantee shall hold it for his life, and yet it was granted and was executory for the counsel, but by the act of God the grantee is discharged of giving counsel; for no counsel can be given to the grantor when he is dead; per omnes barones. Pl. C. 456. b. Trin. 15 Eliz. in Sir Tho. Wroth's case.

III. An annuity was granted to an attorney *pro consilio impenso & impendendo*, and afterwards there being a difference between the grantor

* Fol. 435.

Br. Conditions, pl. 52. cites S. C. and 9 E. 4. S. P. that

* Dav. 1. b. S. P. and 12. seems to be misprinted.—Co.

Br. Conditions, pl. 45. cites 21 E. 3. 7. that this is a forfeiture, and

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Pl. C. 382. a. S. C. cited accordingly.

grantor and a stranger, the attorney gave counsel to the adversary, but not to the grantor, he not requiring any of him in that matter. The court held that his annuity was not determined hereby. Dyer 369. b. pl. 53. Pasch. 22 Eliz. Plomer's case.

But if a tenant in common grants annuity to

bold courts, and he summons it without his companion, and the grantee refuses, this is no forfeiture, because it is a void summons. D. 377. a. pl. 28. Marg. cites 27 Elis. Hurleston's case.

IV. Annuity granted *pro exercitio officii seneschalli*; refusal to hold a court is a forfeiture. D. 377. a. pl. 28. Trin. 23 Eliz. Anon.

V. If *A. pro consilio impenso &c. makes a feoffment or lease for life, albeit he denies counsel, yet A. shall not re-enter*; for in this case there ought to be legal words of condition or qualification; for the cause or consideration shall not avoid the estate of the feoffee, and the reason of this diversity is for that *the estate of the land is executed, and the annuity is executory.* Co. Litt. 204. a.

[(B. b. 2) Till he be promoted to a Benefice.]

[12. If an annuity be granted till the grantee be promoted and preferred to a benefice of 30 l. a year by the grantor, and after the grantor presents him, but the grantee is found insufficient, the annuity shall cease. Pasch. 1 Jac. B. dubitatur.]

[13. [So] if an annuity be granted till the grantee be promoted to a benefice by the grantor, if he proffers a benefice to him which is litigious, yet the annuity is determined, for perhaps he has a good title thereto, though it be litigious. 17 E. 3. 11. dubitatur.]

[14. But if the church be full of another at the time of the presentation, the annuity is not determined, though he accepts the presentation, for the presentation and acceptance is void. 26 E. 3. 69. b.]

[15. If an annuity of 20 l. per annum be granted till he be promoted to a benefice, the benefice ought to be of the value of 100 marks a year. 16 E. 2. Annuity, 47. Issue thereupon.]

[16. If an annuity be granted to another till he be promoted to a competent benefice; if the grantor after tenders to him the presentation to a vicaridge, which is worth 100 marks per annum, which he refuses, the annuity is determined. 3 Hen. 6. Annuity, adjudged, 31 E. 3. Annuity 28.]

[17. The benefice ought to be of as much yearly value as the annuity is, otherwise it is not determined. 3 E. 3. Annuity, 40. Temp. Ed. 1. Annuity 50.]

[18. The value of the benefice shall be reckoned according to the demerit of the party to be promoted. 31 Ed. 3. Annuity 28.]

[19. If the grantor presents the grantee to an ewe-benct (that is, the custody of the holy-water,) this does not determine the annuity, for he is removeable at the will of the parishioners. 3 E. 3. Annuity 40 adjudged.]

[20. If an annuity be granted till promoted &c. by the grantor or his heirs, it is a good performance of the condition that he was promoted by the mother of the grantor at the request of the grantor, in discharge of the annuity. 33 E. 1. Annuity 51. adjudged.]

[21. If an annuity be granted to an infant till he be promoted to a benefice; if the grantor tenders him a benefice, though he cannot take it for the nonability of his person, yet the annuity is determined. 3 Ed. 3. Annuity 40.]

Annuity was granted to A. till he was promoted to a competent benefice; and

in action brought the defendant pleaded, that the plaintiff had taken wife, and so cannot receive a benefice; and adjudg'd a good plea. Br. Annuity, pl. 16. cites 7 H. 4. 16.

In annuity upon a grant, till the grantee was promoted to a competent benefice, and he refused. The plaintiff said, that it was a benefice with cure, and that none may take by the law of Holy Church before the age of 24, and he was only 22 at the time of presentation; and the other said that he was 24, and so to issue. Brooke says it seems to be ill pleading, for he shall not answer the refusal; for if he refuses where the ordinary was ready to have suffered him to have this presentment, he has extinguished the annuity, as it seems. Br. Conditions, pl. 54. cites 19 H. 6. 54.

[22. If the grantor resigns a prebend to the grantee, and the bishop at the request of the grantor tenders the prebend to the grantee; if he refuses it the annuity is determined. 16 E. 2. Annuity 47.]

[23. If the annuity be granted *quousque de beneficio sibi providerit quod duxerit acceptand'*, the grantee is not bound to accept any benefice of any action, but at his pleasure, because of the said words; and by this refusal the annuity shall not be determined. Temp. E. 1. Annuity 50. adjudged.]

[24. If an annuity of 40s. [40l.] a year be granted till promoted to a benefice, a vicaridge of the value of 5l. per annum is not sufficient within this condition. 19 E. 2. Annuity 49.]

Fol. 436.

[25. But it ought to be of the value of 10 marks per annum at the least, and this is sufficient. 19 E. 2. Annuity 49. Issue thereupon.]

26. Annuity of 10 marks was granted till the grantee was advanced to a competent benefice, and they were at issue upon the value of the benefice tender'd and refused, viz. that it is not worth 10l. &c. and the others e contra where the annuity was of 10 marks. And it was said that if he had accepted the benefice, that it had extinguish'd the annuity, of whatsoever value the benefice had been; Brooke says the reason seems to be in as much as the acceptance proves that the grantee took it for competent. Br. Annuity, pl. 30. cites 10 Aff. 4.

27. If an annuity be granted by J. Abbot of D till the grantee [188] be promoted to a competent benefice by the same abbe, tender of the benefice by his successor is not good. Contra if it had been by the abbot of D. and J. had been left out. Br. Conditions, pl. 214. cites 15 H. 7. 1.

(B. b. 3) Pro Consilio impenso & impendendo. Pleadings.

1. IN debt, the plaintiff counted how he was retained of counsel 3. P. per with the defendant for 20 years for 20l. per ann. and that so much was arrear, &c. and per Cur. the count is not good, for he
Vol. V. P ought 11. 6. 8.

ought to count that he counsell'd him, or was ready to counsel in case the other had demanded it. Br. Count. pl. 5. cites 3 H. 6. 33.

Br. Count, pl. 57. cites 40s. per ann. *pro consilio impenso & impendendo*, he counted how he had counselled the predecessor and his covent after the grant, such a day, year, and place, as he ought, as it seems; for otherwise he cannot charge the successor upon a grant of the predecessor without covent-seal, unless it were for something which should come to the use of the house, nor count of counsel before the grant; by reason of this word *impenso*, and yet well; per Danby and Davers, but he need not count in what matter he counselled him. But says quære if he shall shew such matter upon grant made by another man. Br. Annuity, 27. cites 38 H. 6. 22.

3. Debt upon arrears of annuity by J. B. against the abbot of C. upon demand of 40 l. and counted that K. late abbot, &c. by deed, &c. granted to him 40 s. of annuity out of the monastery aforesaid *pro consilio* to the same abbot and convent *impenso & impendendo*, and that at the time of making the deed he was and yet is learned in the law, and that he had given his counsel to the said late abbot and covent at S. in his practising the business of the house ad proficuum of the said house; and that K. abbot died, and J. now defendant was elected and made abbot, &c. and for so much arrear in the life of the said abbot he brought this action; and held good per Cur. though he said that he counselled the predecessor in managing the business of the house ad proficuum dictæ domus, and did not say in what business; for if the defendant denies it the other shall shew it in his replication, and shall shew there in what, &c. Br. Annuity, pl. 28. cites 39 H. 6. 22.

S. P. Br. Abbe, pl. 12. cites 4. And in such action against successor upon deed of the predecessor without covent-seal he ought to count that he counselled the predecessor to the use of the house; for otherwise the successor is not chargeable. Ibid.

Ibid. 5. Contra where the action is against the same abbot who granted; for deed or contract of the abbot alone of a thing which comes to the use of the house shall bind the successor, and if he who granted does not demand counsel, yet the action lies against him because he did not refuse; but contra against his successor, for if no counsel was given to the use of the house, the successor shall not be charged; quod nota per Cur. Ibid.

Br. Dette, pl. 114. cites 40 s. per ann. of annuity *pro consilio suo impenso & impendendo*, &c. payable, &c. and if the rent was arrear, that he may distrain in the manor of B. and shewed that he was of counsel, &c. and counsell'd him such a day and place, and that 10 l. was arrear. And it was agreed that the plaintiff need not shew in what thing he counsell'd him, but this shall come of the [part of] the defendant if he finds default in it; per Choke, he need not shew that he counsell'd him, but it suffices that he was always ready to have counsell'd him if he had required it; for he is not bound to offer counsel without request; for he cannot know whether he needs counsel,

nor

hor in what till it be shewn to him. Br. Annuity, pl. 23. cites 5 E. 4. 53.

7. And it was granted that the plaintiff need not shew in what county the manor is, for if he has levied by distress, this shall come of the other part to shew; by which the defendant [said] that the plaintiff had levied it upon distress in the manor charged, and no plea, for he shall answer to the debt, because the manor is in the same county, by which he said that levied by distress in the manor, and so nil debet &c. And he shall have this plea which is matter in fact without an acquittance, though it be found upon speciality, as in debt upon obligation, and where 'tis executory, as annuity or rent upon a lease for years, by which he had the plea, but shall not say nothing owing to him against specialty. Br. Annuity, pl. 23. cites 9 E. 4. 53. and cites the like judgment, Mich. 6 E. 3.

8. An annuity was granted for life pro consilio impenso &c. and in a writ of annuity brought for the arrears, the defendant pleaded, that before any arrearages incurred, he required the plaintiff to do him service, and he refused &c. The plaintiff replied, that before any refusal, the defendant on such a day and place discharged him from his service &c. The court held that the defendant's plea was not good, because he ought to have shewed for what manner of service the plaintiff was retained to do, and the annuity granted, and then shew specially what service the plaintiff required of him, and what he refused. Le. 209. pl. 292. Mich. 32 & 33 Eliz. C. B. Bagshaw v. Earl of Shrewsbury.

Annuity was brought against the successors of the bishop of Ely, who granted to the plaintiff the stewardship of all courts, &c. for life with a fee of 40s. per annum de manerio

de D. and the plaintiff shewed that he kept the courts, but did not set forth any ingrossing of the rolls, and that after the bishop discharged and forbade him to keep any more courts, tho' he was ready to do it, and that for divers years after the bishop paid not the annuity. If the bishop dies it seems he ought to tender his service to every successor, and it is issuable that such successor non exoneravit. D. 156. b. 157. a. pl. 26. Mich. 5 Mariz. Lucas v. the bishop of Ely. Cites Trin. 20 H. 8. Lucas v. the prior of Huntingdon.

9. In action brought by a counsel for an annuity granted him pro consilio impendendo, he must aver that he was always ready to give him his counsel. Jo. 294. 8 Car. in Itinere Windsor, cited by Mr. Attorney as resolved in Mingay's case.

(C. b) At what Time it is to be performed, where no Time is limited. Presently; within convenient Time.

[1. **WHEN** the act by the condition of an obligation to be done to the obligee, is of its own nature transitory, (as payment of money, delivery of charters, and the like) and no time limited, it ought to be performed in convenient time. Co. 6. Botbie 31. Co. Lit. 208. (a. b.)]

The cash was, viz. debt upon bond conditioned to deliver up a bond to the plaintiff.

wherein he and the defendant were bound to T. for payment of 5l. and also that the defendant should acknowledge satisfaction of a judgment had on that bond, and also should deliver true notes of all bills of charges which concern the same, &c. The defendant pleaded, that there were no bills of charges for

for or concerning the same, but said nothing to the residue, pretending that he need not, because they are collateral acts, and no time limited for performing them. But adjudged that he ought to have performed the residue of the condition in convenient time, without any request; and this diversity was taken and agreed that, Where, by the condition of a bond any thing is required to be done to the obligee, which in its own nature is transitory, as payment of money, &c. and no time is limited when it should be paid, there, though a place of payment is expressed, the thing must be done in convenient time: and so it shall be where a place was appointed; and so likewise where the act is local of its own nature without expressing a place, when the obligor may perform it without the obligee, as the acknowledging satisfaction in this case. But if the concurrence of the obligee is necessary, he has time during life, if not hastened by request; As where it is to infeof the obligee, but if it be to infeof a stranger, there he ought to do it in convenient time, because he has undertaken to do it; but if it be that a stranger shall infeof the obligee, there he ought to hasten it by request, because the obligee is party. 6 Rep. 30. b. Mich. 3 Jac. C. B. Bothie's case, alias, Bothie v. Smith.—In some case a man shall have time during his life, as where no benefit shall be to any of the parties, as if the condition were to go to Rome; per Wray. Le. 125. pl. 170. in case of Cater v. Boothe, S. C.

* Br. Conditions, pl. 166. cites S. C. he ought to seek the obligee and pay it presently; per Brian & Curiam.—Br. Obligation, pl. 55. cites S. C. accordingly by all the justices.

[2. If the condition of an obligation be to pay a less sum, and no day of payment limited, he ought to pay it presently, scilicet, within a convenient time. * 20 E. 4. 1. b. 18 + 44 E. 3. 9. + 21 E. 4. 39. b. || 14. H. 8. 23. Contra ¶ 10 H. 7. 15. Contra + 9 E. 4. 22. b.]

+ If a man be bound to another in a bond, and no day of payment is limited, the sum is due and payable immediately. Br. Obligation, pl. 12. cites 44 E. 3. 9.—S. P. per Perly, quod nullus negavit. Br. Obligation, pl. 28. cites 38 E. 3. 12.—S. P. But he is not bound to pay it without request. Br. Obligations, pl. 34.—S. P. Ibid. pl. 55. cites 20 E. 4. 1. and the obligor ought to seek the obligee and tender it and pay it immediately, and in pleading he shall say, that he has been all times ready to pay, and yet is.

¶ Br. Conditions, pl. 173. cites S. C.

|| Br. Conditions, pl. 61. cites 14 H. 8. 17. per Brudenel, that he ought to pay it as soon as he can go to him to do it. [This case begins at fol. 17. and reaches to almost the end of fol. 23.]

¶ If the condition be to pay 10 l. and limits no day, the obligor has liberty during his life to perform it; But if it be a single obligation, and no day of payment expressed, it is payable immediately, and so is the diversity; per Fineux quod nota. 10 H. 7. 15. a. pl. 11.—But Mo. 472. it was agreed per Cur. obiter, that if one be bound to pay money on covenant or single obligation, he ought to pay it in convenient time without request; but if upon an obligation with condition, he has time during his life.—Debt upon obligation of 100 l. conditioned for the payment of 50 l. and no day limited for the payment of the lesser sum; Resolved it was payable presently, upon request. Cro. E. 798. pl. 48. Mich. 42 & 43 Eliz. B. R. Nuse v. Bacon.

+ Br. Conditions, pl. 74. cites S. C. that he is not bound to pay without request; per Choke, to which Brian and Littleton agreed.

[3. If the condition be to make a retraxit of a suit, he ought to make it within convenient time. 20 E. 4. 8. b.]

Br. Conditions, pl. 182. cites S. C.

[4. If the condition be to perform the award of J. S. who awards the obligor to pay 10 l. without limiting any time, he ought to pay it in convenient time. 22 E. 4. 25.]

For though the acknowledging the satisfaction is local, yet because he may do it in the absence of the obligee, he must do it in convenient time. 6 Rep. 30. b. 31. a. Mich. 3 Jac. C. B. in S. C.

[5. So if the condition be to acknowledge satisfaction in such court, he ought to do it within a convenient time. Co. Lit. 208. b. Co. 6. Bothie 30. b. adjudged.]

[6. So if the condition be to deliver to the plaintiff an obligation of 20 l. in which the plaintiff and B. stood bound to the defendant; though no time be limited for doing thereof, yet he ought to do it in convenient time. Co. 6. Bothie 30 b. adjudged.]

[7. If A. demises to B. and C. certain tithes for 99 years, if A. so long lives, and after B. assigns over by indenture his moiety to D. and

and B. also delivers to D. an obligation, in which D. then stood bound to B. in 400 l. for the payment of 200 l. to B. at a time then past. And thereupon, in consideration that B. at the instance and request of D. would deliver to D. the counter-part of the said indenture of assignment, sealed with the seal of D. D. assumed, that if he should sell to any person his interest in the said moiety so to him assigned by B. then D. would pay to B. 200 l. in satisfaction of the said obligation; and that if he sold the said interest in the said moiety to him assigned for more than 200 l. then he would pay to B. one moiety of such money as he should sell it for more than 200 l. and that if he did not sell the said interest in the said moiety so assigned, then he would re-deliver to B. the said counter-part of the indenture of assignment, and the said obligation safe and not cancelled; and thereupon B. delivers to D. the said counter-part and obligation. This promise being made 20 July 18 Car. and B. brought an action thereupon, Hill. 20 Car. and averred in his declaration, that D. had not sold his said interest in the said moiety, and yet had not re-delivered the said counter-part and obligation according to his promise, licet ad hoc faciend' postea, 20. Sept. 20 Car. at such place &c. he was requested (*). The action lies upon this declaration, for D. shall not have all his life to sell it, but he ought to do it in a convenient time; for otherwise he may stay till the old age of A. upon whose life the estate is to determine, and then it will be but of small value, which was not the intent of the parties; but the intent was to sell it for the best value, or to re-deliver the counter-part and obligation. P. 23. Car. B. R. between *Williamson and Henly*, adjudged upon a demurrer. Intratur Tr. 21 Car. Rot. 362. For though he does not take upon him to sell it, but only to pay so much if he sells it, and if he does not sell it to re-deliver &c. yet upon the whole contract it appears, that this amounted to a taking upon him to sell or re-deliver &c. which ought to be within a convenient time, or otherwise it will be of no effect to B.]

• Fol. 437.

[8. If the condition of an obligation be to pay a certain sum to a stranger, without limiting any time, this ought to be done in convenient time. Mich. 14. Jac. B. R. the *bishop of Rochester* adjudged in arrest of judgment.]

[9. If a devise be made to another, upon condition to pay his debts; if he does not pay them within a convenient time, the condition is broke. Contra 38 E. 3. 11. 6.]

[10. If a man devises lands devisable to his executor to sell, and to distribute the money for the payment of his debts, he ought to sell it as soon after the death of the deviser as he can, otherwise the condition is broke. 38 Aff. 3.]

to distribute for the soul of the testator, and because they took the profits to their own use the heir entered upon them, and adjudged well.—Br. Entry conceable, pl. 124. cites S. C. and that the entry of the heir was adjudged good.—Fitzh. Entry conceable, pl. 46. cites S. C. accordingly.

[11. For if after the death of the testator a man tenders to him a certain sum for the lands, and he refuse it, because it is not to the value of the lands, and after retains the lands in his hands, to the intent to sell it dearer to another, and in the mean time takes the profits

Br. Conditions, pl. 215. cites S. C. but there it is said to be Br. Entry conceable, profits conceable,

pl. 124. profits to his own use, and not for the soul of the testator; the con-
 cites S. C. dition is broke. 38 Aff. 3. adjudged.]
 —Fitch.
 Entry con-
 geable, pl. 46, cites S. C.

[12. [But] if a *seoffment* be made upon condition, that he shall sell it as soon as he can, and as profitably as he can, and the money taken for the same lands shall be distributed for his soul. If the *seofftee* continue the possession a year and a half, because he finds not a chapman to buy it, and takes the profits of the land, but never claims any estate but under the condition aforesaid, and is always of good
 [192] will to sell the lands if he could find a chapman, the condition is not broke; for there is no default in him. 26 Aff. 39. dubitatur.]

[13. If A. in consideration of 50 l. given to him by B. assumes to procure the wardship of the body and lands of C. to be granted by the king (to whom it belongs) to B. during the minority of C. who was then of the age of 13 years, he ought to procure it in a convenient time without any request; because otherwise the benefit of the profits of the land will be lost in the mean time, P. 8 Car. B. R. between *Vine and Hetherington*, adjudged upon demurrer; per Curiam. Intratur Tr. 7. Car. Rot. 27.]

14. If one covenants to assure land to another and his heirs, he ought to do it in convenient time; by Anderson Ch. J. Arg. 2. And. 73, 74. cites 16 Eliz.

15. If A. covenants to assure land to J. S. during A.'s life, A. shall not have time during his life for the assuring of it; for then the covenant would be to no purpose; per Anderson Ch. J. Arg. 2. And. 74. cites 16 Eliz.

16. So if A. covenants to grant an annuity to J. S. during his life, or to assign his lease for term of years or life &c. or to marry such a woman, all these ought to be done in convenient time; for in all these cases the covenants are of no effect of liberty during life shall be left to him, who by the intent of the deeds ought to perform the things before; per Anderson Ch. J. Arg. who said the reasons are apparent, and therefore not particularly mention'd here. 2 And. 74. cites 16 Eliz.

17. A bond was conditioned to permit the obligee, or his assigns, not only to thresh his corn in the obligor's barns, but also to carry it away from time to time at all convenient times hereafter, or to pay 8 l. on request; that then &c. The corn lay in the barn 2 years, and was much devour'd by mice and rats; the obligor thresh'd the residue, and the obligee brought his action. Anderson took a difference between the words (at convenient time) and (within convenient time) that if he will come in the night, or on the sabbath-day, this is not a convenient time, but tho' he comes a long time after, yet it may be (at) time convenient, and the words are not (within time convenient) and Windham said that if it had been (within) time convenient, there would have been a difference. Goldsb. 76. 77. pl. 8. Hill. 30 Eliz. The Earl of Kent's case.

18. The testator devised an house to his wife and his heirs, upon condition that she by advice of counsel in convenient time, should assure

assure the same for maintenance of a free-school &c. She did not make assurance in 8 years after the death of the testator; adjudg'd that the condition was broken. 1 Rep. 25. b. Mich. 34 & 35 Eliz. in the Exchequer, in the case of the queen v. Porter (alias) Porter's case.

19. Feoffment on condition that *if the feoffee does not pay &c.* *that it shall be lawful for the feoffor to re-enter.* The money ought to be paid to the feoffor in time convenient; for it is not reasonable that the feoffee shall have the benefit of the land, and not pay the money; per Anderson Ch. J. 2 And. 73. Mich. 39 & 40 Eliz. Obiter. Litt. S. 337. & Co. Litt. 208. a.

20. But if condition be that *if the feoffor pays &c.* that he may re-enter, the feoffor has time to pay it during his life, because the other has the profit of the land, and has no loss by non-payment, Per Anderson Ch. J. 2 And. 73. Mich. 39 & 40 Eliz. Obiter.

21. If one be infeoff'd, on condition *to make a grant of a collateral thing, as estovers, common, &c.* he ought to do it upon request, and at his peril before the time incurred in which the grantee is to take any benefit of the grant as before the time of taking the common or estovers. Agreed by all the justices. Mo. 472. pl. [193] 679. Mich. 39 & 40 Eliz. in case of Lord Cromwell v. Andrews.

(D. b) At what Time it shall he performed where no Time is limited, *Not before Request.*

[1. **I** *F land be granted to the king upon condition to grant to any* (*) *stranger*, it seems he is not bound to do it before request. * Fol. 438.
D. 3. 4. Ma. 139. 32.]

[2. If the condition of an obligation be *to pay a certain sum to a stranger*, without limiting any time, it ought to be paid within a convenient time *without any request.* Mich. 14 Jac. B. R. the bishop of Rochester adjudged, this exception being moved in arrest of judgment.]

[3. If the condition of an obligation be *to pay a certain sum to the obligee*, without limiting any time, he is not bound to pay it before request.]

[4. If the condition of a feoffment be *to infeoff a stranger upon request*, he is not bound to infeoff him before request. 19 H. 6. Fitzh. Entre Congeable, pl. 2. cites S. C.
34. b.]

[5. So it is if it be *to infeoff the feoffor upon request.* 19. H. 6. 34. b.]

[6. So if the condition of a feoffment be, *that he shall re-infeoff the feoffor*, he is not bound to do it before request. 38 Aff. 7. * 44 * Br. Conditions, pl. 217. cites S. C. — Br. Tender
Aff. 26. † 43 E. 3. 9.]

pl. 33. cites S. C. † Br. Conditions, pl. 26. cites 44 E. 3. 8. S. P. [and Roll seems misprinted (43) for 44]. — S. P. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. by Portington. — Mo. 472. S. P. agreed per Cur. obiter. — In such case he has time during his life, unless request be made in the mean time; but if request be made he ought to infeoff upon request; if the feoffees dies the condition is broken, but not if the feoffor dies, because he may infeoff his heir. Mo. 472.

[7. So where the condition extends to the *feoffee or his heirs to re-infeoff* the feoffor, the heir after the death of the feoffee is not bound to do it before request. 38. Aff. 7.]

* Br. Con-
ditions, pl.
26. cites
S. C. &
S. P.—
Fitzh. Entry
songeable, pl. 33. cites S. C.

[8. If a feoffment be upon condition to give it to a stranger in tail, the remainder to the right heirs of the feoffor, the feoffee is not bound to do it before request, because the feoffor is to have an estate by the condition. 44 Aff. 26, * 44. E. 3. 9. b. Curia.]

[9. If W. in consideration that T. will marry M. his cousin before the return of W. from London to Norwich, assumes and promises after his return from London to Norwich aforesaid to pay to T. 10 l. and to find sufficient security for the payment of 40 l. more at the death of W. and after T. marries with M. and W. returns from London to Norwich, he ought to pay the 10 l. and find the security for the 40 l. within a convenient time after his return, at his peril; and there needs no request to be made by T. for he hath taken upon him to do it at his peril. Mich. 31, 32 El. B. between Peter and Carter adjudged M, 31, 32. El. B. R.]

[194] (E. b) At what Time it ought to be performed
where no Time is limited.
During the Lives of the Parties,

* Br. Con-
ditions, pl.
104. cites
S. C.
† S. P.
agreed by
all the jus-
tices. Mo.
106. pl. 249.
Mich. 17 &
18 Eliz. An-
drews's case,
S. C.—

[1. IF a man makes a feoffment upon condition to re-infeoff him, if he does not re-infeoff him during the life of the feoffor, the condition is broke, if he had convenient time to re-infeoff him before his death. * 18 Aff. 18. adjudged, lord Clifford's case. Regularly, if the feoffee or grantee be upon condition to re-infeoff or re-grant any estate to the feoffor or grantor, without limiting any time, the feoffee or grantee hath time to do it during his life, if he be not hastened by request. Co. 2. † Lord Cromwell, 78. b. 79.]

Co. Litt. 208. b. S. P.

[2. But in the said rule, if the case be, that it appears by the thing to be performed, or by any accident, that the feoffor cannot have all the benefit intended him by the condition, the condition is broke without any request and during the life of the feoffee or grantee. Co. 2. lord Cromwell, 79.]

And. 17. pl.
35. Andrews
* Fol. 439.

v. Elunt,
S. P. ad-
judg'd ac-
cordingly;
and upon

[3. As if A. conveys a manor to which an advowson is appendant to J. S. in fee, upon condition that J. S. shall re-grant the advowson to (*) A. for his life, and if it happens not to be void in his life, then one turn to his executors; though in this case J. S. has all his life to re-grant it, if he be not hastened by request, and the church does not become void in the mean time, † yet if the church becomes void during his life, before any request, the condition is broke, because the feoffor cannot have all the effect which was intended him by the re-grant,

re-grant, which was to have all the presentations during his life. the same
Co. 2. *lord Cromwell*, 78. b. 79. resolved.] grant.—

S. C. adjudg'd.—D. 311. a. b. pl. 83, 84. S. C. adjudg'd.—Jenk. 252. pl. 43. S. C. resolved.
—Co. Litt. 222. b. cites S. C. resolved.

† Per Coke Ch. J. 3 Bulst. 169. in such case he ought to grant it presently; for it is now a fruit
fallen, and otherwise it would be prejudicial to the party.

[4. [So] If A. *infeoffs* B. the first of May, upon condition that S. P. agreed
he *shall* grant to A. an annuity or rent *during his life, payable year-* by all the
ly, at Mich. and the Annunciation; in this case the feoffee has not justices.
time to do it during his life, but he ought to do it before the first *Mo. 72.*
of the said feasts, or otherwise A. shall not have all the advantage *pl. 679. in*
of the rent intended him by the condition. Co. 2. *lord Cromwell*, S. C.—
79. Vide 8 H. 4. Vide 14 E. 3. Det. 138.] Co. Litt. 208. b. at
the bottom,
S. P.—

Goldb. 117. in pl. 14. Arg. S. P.

5. In some cases, albeit the condition be *collateral*, and is to be Roll. Rep.
performed to the obligee and no time limited, yet in respect of the 374. in. pl.
nature of the thing, the obligor shall not have time during his 26. Arg.
life to perform it; as if the condition of an obligation be *to grant* cites 14 E.
an annuity or yearly rent to the obligee during his life, *payable* 3. Debt. 133.
yearly at the feast of Easter. This annuity, or yearly rent, must S. P.
be granted before Easter, or else the obligee shall not have
it at that feast during his life. Et sic de similibus, and so it was
resolved in Andrews's case. Co. Litt. 208. b.

6. Where a man may do a thing at any time during his life, if [195]
not hasten'd by request, yet if *any thing happens in the mean time* * 2 Rep.
before the performance, *so that it cannot be performed according to* 79. a. S. P.
the intent of the condition, the condition is broken. Arg. Roll. R. per Cur.
374. cites * 3 Rep. Cromwell's case. cites 14 E.
3. Debt 138.
—Co. Litt. 208.
b. S. P. and cites S. C.

7. Where a man is bound *to infeoff a stranger*, and no time is S. P. 6 Rep.
limited, he has all his life to do it. *Quære inde*. Br. Conditions, 31. a. but
pl. 136. cites 9 H. 7. 17. agreed e

concurrency of the obligor and feoffee is requisite, yet he ought to do it in convenient time, for in such
case the obligor has taken upon him to do it to the stranger, and may perform it without the concu-
rence of the obligee. But when the obligee himself is party, and the act cannot be done without his
concurrence, there it is reasonable that the obligor shall have time during his life, if the obligee does
not hasten it by his request, because in such case the obligor does not take upon himself for the obligee,
who is a party to the deed, as he does in the other case for the stranger.

8. *Feoffment on condition that if feoffor pays &c. that he shall re-*
enter. The feoffor has time during his life to pay it; because the
feoffee has the profit of the land, and has no loss by the non-pay-
ment; per Anderson Ch. J. Arg. 2. And. 73. Mich. 39 & 40
Eliz.

9. When the act of its own nature is local, and to be performed to As if one
the obligee, and to the performance thereof the concurrence of the be bound in
obligor and obligee is requisite, there the obligor shall have time dur- a bond to
ing his life, unless hasten'd by request. 6 Rep. 31. a. agreed *infeoff J. S.*
Mich. 3 Jac. C. B. in Bothy's case (alias) Bothy v. Smith. of land,
without
limiting any
time,

time, there because the estate must pass by livery of seisin, and so both parties must concur, and the one cannot do it without the other, and it cannot be done but upon the land, the obligor has time during his life, unless hasten'd by request to the obligor; for it is not reasonable that the obligee may request it on the land when he will, for that would be to compel the obligor to continue always upon the land, which would be inconvenient. Ibid.

10. A. covenants to assure a manor to B. within 2 years, and to bind himself in a bond to pay 100 l. to C. adjudg'd that the bond shall be made within the 2 years, but if the contract to make the bond had been in another sentence, then he should have time during his life. D. 347. Marg. pl. 10. cites Mich. 3 Jac. C. B. Brachenbury v. Brachenbury.

6 Rep. 31. 11. When the obligor, feoffor, or feoffee is to do a sole act or labour, as to go to Rome, Jerusalem, &c. in such and the like cases, the obligor, feoffor, or feoffee has time during his life, and cannot be hasten'd by request. And so it is if a stranger to the obligation or feoffment were to do such an act, he has time to do it any time during his life. Co. Litt. 208. b. 209. a.

6 Rep. 31. a. b. Mich. 3 Jac. in Rothy's case. S. P. accordingly, such act in no manner concerning the obligor, obligee, or any other person.——S. P. by Wray accordingly; or in such case no benefit accrues to any of the parties. 1 Le. 125. in pl. 279. Trin. 30 Elis. B. R.

12. If a feoffment be made upon such condition, that the feoffee shall give the land to the feoffor and his wife to have and to hold &c. to them and the heirs of their two bodies &c. albeit the same be a stranger, yet the feoffee is not bound to make it within convenient time, because the feoffor, who is privy to the condition, is to take jointly with her. Litt. S. 352. and Co. Litt. 219. a. b.

13. If the condition be to infeoff the feoffor and a stranger, the feoffee has time during his life, unless he be hasten'd by request; otherwise 'tis where the condition is to infeoff a stranger or strangers only. Co. Litt. 219. b.

[196] 14. If a man make a feoffment in fee upon condition that the feoffee shall make a gift in tail to the feoffor, the remainder to a stranger in fee, there the feoffee has time during his life, because the feoffor, who is party, and privy to the condition, is to take the first estate; but if the condition of a feoffment were to make a gift in tail to a stranger, the remainder to the feoffor in fee, there the feoffee ought to do it in convenient time; for that the stranger is not privy to the condition, and he ought to have the profits presently. Co. Litt. 219. b.

15. Where one is to grant a reversion, he has time during his life to do it if it continues so long a reversion, unless he be hasten'd by request; per Windham J. Lev. 44. Mich. 13 Car. 2. B. R.

(F. b) At what Time the Condition shall be performed when no Time is limited.

To the Obligor. Feoffor.

Br. Conditions, pl. 67. cites 14 H. [1.] If the condition be to be performed to the party himself only, who is to take advantage of the breach of the condition, the

the feoffee is not bound to do it before requested. D. 3. 4. Ma. 3. 17. per Brooke. 139. 32.]

the feoffor and his heirs, he has time during his life, if request be not made in the mean time; but if request be made he ought to infeoff upon request, and if the feoffee dies before, the condition is broke, but not if the feoffor dies, because he may infeoff his heir. Mo. 472. pl. 679. Mich. 39 & 40 Elix. agreed.

(G. b) [At what Time it must be performed,]
To a Stranger.

[1. *FEOFFEE* upon condition to infeoff a stranger ought to do it presently. * 44 E. 3. 9. D. 3. 4. Ma. 139. 32. † 44. Br. Conditions, pl. 26. cites 44. Ail. 26.] E. 3. 8. S. C. & S. P.

for the stranger cannot make request, nor can he take notice thereof. — Fitzh. Entre congeable, pl. 33. S. C.

† Br. Conditions, pl. 217. cites S. C. that he ought to tender it to a stranger without request. — If it be to infeoff a stranger before such a day there needs no request, but the feoffee ought to offer the feoffment to the stranger, otherwise the feoffor may re-enter. — So where it is to infeoff a stranger [generally] he ought to do it immediately, for the stranger cannot have notice; otherwise of the feoffor. Br. Conditions, pl. 74. cites 9 E. 4. 22. per Choke. — It ought to be performed in a convenient time, where notice may be given, having regard to the distance of the time * [Place]. Br. Conditions, pl. 67. cites 14 H. 3. 17. by Brooke. [* But it is at 14 H. 4. fol. 21. a. S. C. and there it is not distance of the (time) but of the (place). — Mo. 472. it was agreed by all the justices obiter, that if one be infeoffed to infeoff a stranger and his heirs, he has time during his life if request be not made; but if request be made he ought to infeoff upon request, but if the feoffee dies, the condition is broke. — There is a diversity between a condition of an obligation and a condition upon a feoffment, where the act that is local is to be done to a stranger, and where to the obligee or feoffee himself; as if one makes a feoffment in fee, upon condition that the feoffee shall infeoff a stranger, and no time limited, the feoffee shall not have during his life to make the feoffment, for then he should take the profits in the mean time to his own use which the stranger ought to have, and therefore he ought to make the feoffment as soon as conveniently he may, and so it is of the condition of an obligation. But if the condition be, that the feoffee shall re-infeoff the feoffor, there the feoffee has time during his life for the privity of the condition between them, unless he be hastened by request. Co. Litt. 208. b.]

(H. b) [At what Time to be perform'd to] [197]
Stranger and Obligor.

[1. *I* F the condition be to infeoff a stranger in tail, remainder to the right heirs of the feoffor, he is not bound to do it before request. * 44 E. 3. 9. b.] Fitzh. Entre congeable, pl. 33. cites S. C.

The feoffee ought to do it in convenient time; for that the stranger is not privy to the condition, and he ought to have the profits presently. Co. Litt. 219. b.

[2. If land be granted to the king, upon condition that he, his heirs and successors, shall give other lands in consideration thereof; the king is not bound to do it in his life, but any of his successors may, for the word (his) extends to every of them. D. 3. 4. Ma. 139. 32.]

3. Baron seised of lands infeoffed J. S. on condition to infeoff him and his wife for life, the remainder over to a stranger in fee; Hut-
ton

ton and Crooke thought a request ought to be made by the *baron*, because the particular estate on which the remainder depends ought to be made to the husband, who is party to the condition, and he may take or refuse it, and the feme is at his will; but *if the baron dies* then he must make the feoffment to the wife without request, because she is a stranger to the condition by act in law; and so *where she dies*, the estate must be made *to him in remainder*, without any request. Het. 56. Mich. 1 Car. C. B. Wilkinson's case.

4. But if the condition be *to infeoff the feoffor and a stranger*, the feoffee must tender the feoffment to the stranger, for he had no notice of the condition, and he ought to be party to all the estate; and by the livery made to him, the feoffor shall take well enough; per Yelverton. Het. 56. Mich. 1 Car. C. B. Wilkinson's case.

(I. b) At what *Time* it ought to be performed where *no Time is limited*.

Upon Request.

* Br. Conditions, pl. 26. cites S. C. but

that was to

infeoff the son of the feoffor and his wife, remainder to the right heirs of the feoffor. — Fitzh. Entre congeable, pl. 33. cites S. C. but I do not observe exactly S. P. — Though the feme be a stranger yet the feoffee is not bound to make it within convenient time, because the feoffor, who is privy to the condition, is to take jointly with her. Co. Litt. 219. a. b.

[1. If a feoffment be upon condition *to re-infeoff the feoffor and his wife*, he ought to do it upon request. 21 E. 3. 11. b. 44 Ass. 26. * 44 E. 3. 9. admitted.]

[2. If the condition of an obligation be *to pay a certain sum* without limiting any time, it ought to be paid upon request. 38 E.

[198]

Br. Conditions, pl. 43. cites S. C.

and if the

debts are

not paid on

demand,

3. 12.]

[3. If a man *devises* lands upon condition *to pay his debts*, he ought to pay them upon request, otherwise the condition is broke, 38 E. 3. 11. b.]

the heir may enter; by Percy, quod non negatur.

Fol. 440.

* 2 Rep. 3.

a. Pasch. 16.

Eliz. C. B.

Manfer's

case, (alias)

Painter v.

Manfer,

S. C. ad-

judged, and

has the

words men-

tioned in

the crot-

chet. —

N. O. 182.

[4. If the condition of an obligation be, that *whereas A. the obligor hath conveyed lands to B. the obligee, if A. the obligor * [and C. his son] shall do all acts and devises for the better assurance of these lands to B. which shall be devised by B. or his counsel*, then the obligation shall be void; and after *B. devises and tenders a release* to be sealed by A. and C. his son, and *A. presently seals it*, but *[C] because he was not letter'd, nor could read it, prays B. to deliver it to him, to shew to some man learned in the law, who might inform him whether it was according to the condition*, and if it was according to the condition he would seal it, which B. refuses, upon which C. refuses to seal it. This was a breach of the condition, because he *did but require the writing to be read to him*, and he was bound to take consufance of the law, whether it was according to the condition, and shall not have reasonable time to shew the writ-

ing to his counsel learned in the law, to be instructed by them, pl. 326.
Co. 2. *Manfer* 3. per Curiam resolved.] Maunxell's
case S. C.
accordingly,

but no judgment, for the justices doubted; and at another day Anderson said, that his opinion was, that the plea was not good.—4 Le. 62. pl. 156. S. C. but states it only as to the obligor himself refusing and nothing is mentioned relating to C. the son; and the court held the obligation forfeited.—S. C. cited according to 2 Rep. & Mo. and that the same was adjudged. 3 Bulst. 30.—S. C. cited Jo. 314.—S. C. cited Godb. 445. pl. 513.—S. P. But if any person be present that can read the deed to him, *if the deed be required to be read, or if the deed be in French, Latin, &c. which the party does not understand; here if the party require one to read or expound the deed to him, and no one is there present who can do it, he may refuse to deliver the deed; so though a man can read, yet if the deed be written in Latin or any other language which the party doth not understand, if the party doth demand that the writing be expounded or read in such language as he may understand it, and no one is present who can do it, the party may refuse to deliver it.* 2 Rep. 3. a. b. *Manfer's case.*

[5. If A. covenants with B. to make such conveyance of certain lands to B. as by him shall be devised, at the costs and charges of B. and after B. devises, and tenders a writing containing a bargain and sole to [B] and A. requires time to have it to his counsel, to be advised thereupon, and B. refuses it, upon which A. does not seal, he hath broke his covenant, for the covenant was peremptory, *Sci. licet*, to be performed presently, at his peril. D. 16 El. 338. 39. See (P. a)
pl. 11. S. C.
and the
notes there.
—S. C.
Jo. 314.
315.—
S. C. cited,
Arg. Godb.
445. in pl.
513.
between Wootton and Coke.]

6. Where a man is bound to pay money, or make a feoffment, or renounce an office &c. and no day is limited when he shall do it, there, upon a request, he is bound to perform it *in as short a time as he can*. But where day is limited, and he refuses before the day, this is no matter if he performs it at the day. Br. Conditions, pl. 65. cites 15 E. 4. 30.

7. Debt upon bond of 200l. condition'd to pay within 2 days after the date of the bond, but no sum mentioned in the condition. The plaintiff declared on a bond to pay so much cum inde requisitus fuerit. After verdict it was moved that the declaration was not good, because of the variance from the condition, there being no certain sum mentioned in the condition; but adjudged, there being no sum mention'd in the condition, the bond must be single, without any condition, and then the money is to be paid upon request. 2 Bulst. 156. Mich. 11 Jac. *Dorrington v. Waller*.

(K. b) At what Time it may be performed where [199]
a Day is limited.
Before the Day.

[1. IF the condition be to stand to the award of J. S. and he awards him to pay 10 l. such a day; it is a good performance if he pays it to the obligee before the day, and the other accepts it; for the payment before contains payment at the day. Hill. 14 Jac. at Serjeant's Inn, between Berrey and Perrin, in a writ of error, where the award was to pay at or before such a day, and the breach assigned for nonpayment at the day, without mentioning the non-payment before, and yet the judgment affirmed per Curiam, because payment before is payment at the day. Mich. 21 Car. B. R. Bridgm. 91.
Perrin v.
Barry, S. C.
and all
agreed, that
the assign-
ment of the
breach was
good.—
3 Bulst. 62.
S. C. and
the pleading
between

held good, between *Ireland and Sutton* adjudged accordingly upon demurrer; and judgment for the plaintiff. *intratur. Tr. 21 Car.]*

—*Ibid.* 169. 70. (though misprinted 67, 68.) S. C. in error in the Exchequer Chamber, and this assigned for error, but over ruled and judgment affirmed. *Mo.* 349. pl. 1154, S. C. but S. P. does not appear. —*Cro. J.* 399. pl. 8. S. C. but S. P. does not appear. —*Rolls Rep.* 223. pl. 29. S. C. but S. P. does not appear; & adjournatur. —*Ibid.* 375. pl. 31. S. C. but S. P. does not appear. —If issue be taken upon solvit ad diem, payment before the day maintains the issue. *Arg. 2 Vent.* 222. *Mich.* 2. W. & M. in C. B. in case of *Watnough v. Holgate.* —3 *Lev.* 293. S. C. and upon demurrer judgment was given for the defendant; for though he did not pay it at the day, he might have paid it before the day, and the payment before the day is good payment at the day, where payment at the day is pleaded; yet in pleading the parties ought to pursue the words of the condition. —See *Tit. Actions (Z. 12)* pl. 32. and the notes there, *Harmond v. Owden* (alias) *Hammond v. Owden.*

Mo. 366, [2. If the condition of an obligation be to pay so much to a stranger 367. pl. 502. *ger such a day*; if he pays it before the day, this is a good performance, because payment before contains payment at the day. 37 *Eliz.* S. P. held accordingly. 9 *H. 7.* 20. 10 *H. 7.* 10. b.]

• *Br. Conditions* pl. 136. cites 9 *H. 7.* 17. [3. So if the condition of an obligation be, that a stranger shall infeoff a stranger such a day; if he infeoffs him before the day, this is a good performance, because it contains a feoffment at the day. S. C. —9 *H. 7.* 18. 20. 10 *H. 7.* 14. b.] The case of 9 *H. 7.* 19, 20. is as here of an obligation that a stranger shall infeoff a stranger; but 10 *H. 7.* 14. is of a feoffment conditioned to be made by the obligor to a stranger; and so is *Br. Conditions*, pl. 242. where he cites S. C.

Br. Conditions pl. 136. cites 9 *H. 7.* 17. [4. So if the condition be, that a stranger shall infeoff a stranger after the death of J. S. If he infeoffs him during the life of J. S. this is a good performance, because it continues a feoffment after his death. 9 *H. 7.* 17. 20.] S. P. accordingly; for the effect is performed, but says quare, and that the case was not adjudged.

Godb. 10. pl. 14. *Mich.* 24. *Eliz.* C. B. *Anon.* [5. If the defeasance of an obligation be, to pay a less sum than is contained in the obligation at a day certain; if he pays it before the day, and the obligee accepts it, that is a good discharge of the S. P. held obligation. 30 *E.* 3. 22. b. 23. admitted by the issue.] accordingly;

but in such case it should be pleaded specially. —So where a copyhold was surrendered on condition for the payment of a certain sum on the first July, and the payment was made before the day, viz. on the 16th June, and the same was accepted, it was agreed by all the court that this was a good performance of the condition. *Cro. J.* 284. pl. 27. *Mich.* 8. *Car.* B. R. *Burgaine v. Spurling.* *Co. Litt.* 312. b. in principio. S. P. —See *Tit. Payment (I.)*

• [200]

Godb. 445. pl. 513. [6. If a condition be to make an assurance within a month after the date of the obligation, he is not bound by any request to make it at any certain time, but he may perform it at any time, (*) within the month. *Hill.* 37 *El.* B. between *Pexpoint and Thimblebye*, per Curiam.]

Eliz. *Pexpoint v. Thimblebye*, S. C. but not exactly S. P.

[7. If a condition be to make further assurance within a month upon request of the obligee; if the obligee requests him within the month, and he refuses, though he be ready after within the month, yet the obligation

obligation is forfeited, in as much as the time of the month is limited to the request. Hill. 37 El. B. in *Pexpoint and Thimblebye's case*; per Curiam.]

[8. If the condition of an obligation be, if the obligor do at all times hereafter, *within the space of one month, when he shall be required, make such further act and acts, assurance and assurances, as the obligee shall by his counsel demand, for the recovery of one annuity of 30 l. due from J. S.* then the obligation to be void. In this case, if the obligee does not demand any further assurance within the month after the making the obligation, yet the obligor is bound to make further assurance within a month after request made after the month past, after making the obligation, because the first words; (scilicet, *at all times hereafter*) are without limitation, and the other words; (*within one month when he shall be required*) refer to the request; scilicet, he shall have a month for the making thereof after request, for the most benign construction shall be made to make this agreement effectual; for this is not like a common assurance, by which it is covenanted to make further assurance within 7 years, because the use in such case has interpreted it, that he shall not be troubled beyond 7 years. Hill. 1650. between *Wentworth and Wentworth* adjudged upon a demurrer. Intratur Trin. 1650.]

Sty. 242. S. C. adjudged per tot. Cur. accordingly, nisi, &c. S. P. cited by Windham J. to have been so resolved in the time of Roll Ch. J. [which seems to intend this case.] Raym. 68. Mich. 14. Car. 2 B. R. in case of *Lawson v. Witherington*, which case was thus, viz.

In debt on an obligation conditioned to pay 100 l. on the 10th of January, upon 3 months warning, the defendant pleaded, that the plaintiff had [not] given three months warning. Windham J. said, that though the condition had been to pay on 10th Jan. after the date of the obligation, upon three months warning by the obligee, the money would not be lost though the obligee should omit the warning; Et adjournatur. — Lev. 85. S. C. the court at first thought that the warning ought to be given by the plaintiff; for otherwise, if the defendant would never give warning, the money would never be paid; Et adjournatur. But afterwards, it being moved again, the court held it should be taken that the obligor is to pay the money upon 10th January next ensuing, giving the plaintiff three months warning; thereof; for the words shall be taken most strongly against the obligor, and judgment for the plaintiff nisi, &c. — Keb. 415. pl. 122. S. C. adjudged for the plaintiff, and ibid. cites the principal case of *Wentworth v. Wentworth*.

9. Condition to pay 10 l. *within an hour after obligee has infeoffed him of a mill.* Payment of 5 l. before and 5 l. after is no performance, for it is no duty till &c. and the 5 l. paid before cannot be intended the same sum; otherwise when day is limited, for there it is a duty. D. 222. pl. 22. Marg. cites Trin. 9 Eliz. Anon.

10. In debt upon bond the defendant pleaded payment according to the condition, and it was found that the payment was made and accepted before the day. Per tot. Cur. payment before the day was a sufficient discharge of the bond; but it being pleaded generally that he paid according to the condition, they held that the jury must find against the defendant, for the special matter would not prove the issue. Godb. 10. pl. 14. Mich. 24 Eliz. C. B. Anon.

11. 20,000 l. was bequeath'd to a daughter, *provided if she marry before 16, or without the consent of A. and B.* then she should lose 10,000 l. and that the 10,000 l. should go to his other children. *She married before 16, but with the consent of A. and B.* Lord K. North thought that both parts must be observed. 2 Vent. 365. Pasch. 36 Car. 2. in Canc. Lord Salisbury's case.

[201] 2 Vern. 223. pl. 203. Pasch. 1691. Lord Salisbury v. Bennet. S. C. says the testator

tator in his life-time treated, after his making this will, with the plaintiff (the husband) for a marriage with his daughter, but before an agreement testator died. It was insisted that here was no devise over and that testator's treaty for a marriage of her to the plaintiff, if there had been any condition precedent, or forfeiture, (as it stood on the will) had been an after dispensation of it. And the court decreed the whole 20,000*l.* to the plaintiff.——Skinn. 285. Hill. 2 W. & M. in Canc. S. C. and that there being no express devise over, but only that in such case the 20,000*l.* was directed to go to the bulk of the testator's personal estate, and which was order'd to be laid out in lands, the whole portion was decreed her.——Nelf. Chan. Rep. 170. Mich. 1691. S. C. decreed accordingly; and says that on an appeal to the House of Peers this decree was confirmed.——2 Freem. Rep. 118. pl. 235. Bennet v. Ld. Salisbury. S. C. affirmed in the House of Lords.——2 Freem. Rep. 187. in case of the duke of Southampton v. Cranmer, says that the case of lord Salisbury was affirmed in the House of Lords.

2 Freem.
Rep. 186.
pl. 263.

S. C. held
accordingly.

——This
decree of
lord Jefferies
was reversed
in the House
of Lords.

Show. Parl. Cases 83. Wood, alias Cranmer v. the duke of Southampton.——[But it seems to have been upon another point, and *ibid.* 87. it is said that as to the objection of the marriage before 16 it was not much insisted upon on the other side, and in reason cannot be, because her continuing married till after 16 does fully satisfy the intent of the deed as to this matter.

12. A clause in a deed was, that if *M.* his daughter should live to attain 16, and should refuse to marry *A.* then the said *A.* should have 20,000*l.* out of his personal estate. *M.* married *A.* before her age of 16, but lived to 16, and before 17 died. Lord C. Jefferies thought that this does not in any sort imply that they might not marry before that time, and decreed accordingly. Vern. 338. pl. 332. Mich. 1685. The duke of Southampton v. Cranmer.

(L. b) At what Time it shall be made [performed]
where Time is limited.

Upon Request.

Cro. C. 299, [1. IF *A.* covenants with *B.* to make a surrender of land, or to convey land to *B.* upon request; if a writing purporting a surrender or conveyance, be tendered to him, with request to seal it, *A.* ought to seal it *presently*, and shall not have any time to be advised by his counsel, whether it be according to the covenant. 300. pl. 1. Symms v. Smith, S. C. & S. P. resolved per tot. Cur. and they all held, that there is not any difference where it is to be done upon request, or upon reasonable request.——Jo. 314. pl. 1. S. C. adjudged accordingly for the plaintiff, absente the Ch. J. But Berkley thought that reasonable request implied, that *A.* should have reasonable time to be informed he not knowing the contents of the deed tendered; but Jones and Crook e contra.——Godb. 445. pl. 513. S. C.

Godb. 445. [2. If a man covenants to make further assurance at all time and pl. 513. 218. times, at the charges of the covenantee, and the counsel advises, that he shall levy a fine, yet he is not bound to do it presently, but he shall have convenient time to do it, though the words be, that he shall do it at all times; for the words ought to have a reasonable construction. Hill. 37 El. B. between *Pexpoint* and *Thimbleby*, per Curiam.]
cites *Pexpoint* v. *Thimbleby*, S. C. that where a man covenanted to make assurance, it was adjudged that he shall have reasonable time to do it

[3. If

[3. If A. being a copyholder for life, covenants with B. to surrender to B. in reversion the said copyhold tenement *super rationabile requisitionem ei fiendam* by B. and after B. tenders to A. a writing purporting a letter of attorney of surrender of the said tenement to B. and A. requests, that before she seals it, she, by her counsel circa scriptum illud infra rationabile tempus tunc proximo sequens advisaretur, the which B. refuses, and therefore A. refuses to seal it; admitting that A. was bound to seal the letter of attorney, and to surrender by such letter of attorney, then she hath broke her covenant; for she ought to take consuance of the law at her peril, whether the letter of attorney was according to the covenant, and she shall have no time to be advised thereupon; but the reasonable time mentioned in the covenant is intended (*) reasonable time in the making thereof, scilicet, she shall have time to read it before she seals it, and therefore it ought to be sealed presently, without time to advise upon request, according to the words of the covenant. Pasch. 9 Car. B. R. between † *Sims and Dame Smith*, per Curiam, resolved upon demurrer. Intratur Hill. 6 Car. Rot. But judgment was given against the plaintiff for another matter. Co. 2. *Manjer* 3. D. 16 El. 338. 39.]

* Cro. Car. 299, 300.
pl. 1. S. C. accordingly per tot. Cur. but a judge for the defendant, because the request as alleged was only an implied request to make a surrender,
* Fol. 442.
whereas it ought to have been an express request.—
Goub 445.
pl. 513.
S. C. & S. P.
sed adjorna-

tur.—Jo. 314. pl. 1. and the court held the request not good.—See (A. d) pl. 37. S. C.

(L. b. 2) Limited to be done on Request. At what Time the Request must be made.

I. Condition to do an act at the end of 7 years on request, request must be made the last day; and per Cur. 'tis not to be done *post finem* but *ad finem*, and the end of a thing is always part of that of which it is the end, and so the request should be made some convenient time in that day, that the other might have a reasonable time to do it in. Adjudg'd per tot. Cur. and so revers'd a judgment in the Marshal's court. 2 Salk. 585; Mich. 3 Ann. B. R. *Fitz-Hugh v. Dennington*.

3 Salk. 308.
pl. 7. S. C. held accordingly.—
6 Mod. 227.
Fitzhugh v. Dennington.
S. C. accordingly, and judgment below reversed nisi.

—2 Lord Raym. Rep. 1094. S. C. and the judgment in the Marshal's Court revers'd. And Holt Ch. J. and Powell J. held that there being a time appointed for the doing the act, the request to do it must be at that time. And the Chief J. said that the end of 7 years was the last day of the 7 years; for there is no fraction of a day, and after 12 at night is after the 7 years; for the day after is not the end of the 7 years, but *post expirationem*. For the beginning and end of a thing is part of the thing. And he said also that when a time is appointed when a thing shall be done upon request, it must be done immediately upon the request (which differs this case from those cited by the counsel for the defendant in error) as if a condition of a bond be to make a feoffment at such a time upon request, there the obligor must do it immediately upon the request. But as to this, Powell said that if it appeared to them, that the thing was of such a nature as that it could not be performed at the time limited for the thing to be done upon request, there the obligor should have a convenient time after to do the thing in, otherwise if it can be done then it must. Powys and Gould J. held that at the end of 7 years might be understood a reasonable time after, sufficient to do the thing in.

(M. b) *Perform'd. At what Time it shall be.
Where Time is limited.*

[1. IF the condition be to do a thing within a certain time, he may perform it the *last day* of the time appointed. 8 H.

4. 14.]

[2. So if the parliament makes a constitution, that if J. S. comes not in B. R. within a quarter of a year after proclamation made, he shall be convicted of a trespass &c. he need not come before the last day of the quarter. 8 H. 4. 13.]

Brownl. 74.

Priest v.

Coe, S. C.

adjudged.—

D. 226. a.

Marg. pl.

96. cites

Pye v. Coe,

S. C. ad-

judged.—

See Tit. Parols (E) pl. 3.—

A bond was dated in March condition'd for payment

super viceffimum octavum diem Martii prox' sequentem. It was mov'd, that (sequentem) refers to the

day which shall be understood of the same month; but if it had been (sequentis) then it had referred

to March, and so it had been payable the next year. But the court was of opinion, that it should be

understood of the current month. Mod. 112. pl. 8. Pasch. 26 Car. 2. B. R. Anon.

[4. If the condition be to pay 10 s. when A. comes to his house, and 10 s. at the Feast of St. Michael, and then at the Feast of St. Andrew then next ensuing 10 s. these last sums ought to be paid at such next feasts or times, and not at the next feasts after A. comes to his house.]

Br. Condi-

tions pl.

174. cites

S. C.

Br. Condi-

tions, pl.

174. cites

S. C. but

Brooke says, quære of infra; for because it was per & infra festum, &c. the defendant pleaded that he

was ready all the vigil, and all the day of the feast.

[5. If the condition be to pay so much on this side such a feast, it ought to be paid in the vigil of the feast at the least, and not on the feast-day. 21 E. 4. 52.]

[6. The same law where it is to be paid *infra festum*. 21 E. 4. 52.]

Br. Condi-

tions, pl. 174.

cites S. C.

Br. Condi-

tions, pl. 174.

cites S. C.

Sty. 30.

S. C. but

S. P. does

not clearly

appear.

[7. The same law where it is to be paid *ante festum*. 21 E. 4. 52.]

[8. But where the condition is to be performed *in festo*, it ought to be done on the feast-day, and not before nor after. 21 E. 4. 52.]

[9. If the condition of an obligation upon an adventure to Newfoundland be to pay so much within 40 days next after the ship shall make her first return and arrival in this voyage from Newfoundland into the port of Dartmouth, or into any harbour, creek, or port of England, where she shall first unlade her goods &c. and after the ship does not return to Dartmouth, but to Plymouth in Devonshire where she unloads her goods; in this case the obligor is bound to pay the money within forty days after the arrival of the ship, and shall not have forty days after the unlading the goods, for this is not for freight, but for an adventure; and the unlading of the goods

is mentioned only to describe the haven where the arrival shall be, scilicet, the port of discharge, and not put to make a limitation of the payment of the money, to have forty days for the payment thereof after the discharge; but perhaps there will be some doubt if the discharge be not within the forty days. Trin. 23. Car. B. R. between *Leere and Cholwicke* adjudged for the plaintiff, this being moved in arrest of judgment, where it was assigned for breach, that he did not pay the money within forty days after the arrival of the ship, and avers, that the ship was unladed of the goods, but no time alleged of the unlading; (*) and per Curiam, *if it was not unladed within forty days, it ought to come of the other part to shew it.* Intratur, Hill. 22. Car. Rot. 912.]

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* Fol. 443.

10. *Payment after the day of payment* is not good, tho' the obligee accepts it. Br. Tender, pl. 5. cites 46 E. 3. 29.

11. If a man infeoffs another, upon condition *to re-infeoff him within 40 days*, there if the feoffor does not make any request within the 40 days, the feoffee shall retain the land for ever. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. Per Newton.

12. *Payment after the day* shall not save the penalty. Br. Tender, pl. 11. cites 22 H. 6. 57.

13. *Nor where a re-entry is reserved* in default of payment, and he pays after the day, yet the lessor may re-enter; per *Falston*, contra *Portington*. Ibid.

14. But all the justices agreed that *in obligation of 20 l. to pay 10 l. at a day*, and he does not pay at the day, but *pays after*, yet this shall not save the penalty. Ibid.

15. If defeasance is made after the sale of land, by which indenture the vendee leases the same land to the vendor for 10 years rendering a rent, and grants that if the vendor shall pay 300 l. within the said term of 10 years, that he may re-enter; and there if he surrenders and tenders the 300 l. within the said 10 years, he shall recover his land. Contra if the grant had been *if he pays 300 l. within the term aforesaid, without those words 10 years, and the lease, surrender and tender of the money* is not good in this case; per *Whorwood*, in his readings in *Quadragesima*. Br. Defeasance, pl. 18. cites 35 H. 6.

16. If in an obligation the *solvendum* is made to the obligor, whereby the *solvendum* is void, the money is demandable immediately, and so if it be made payable *crastino de dooms-day*. Br. Obligation, pl. 58. cites 21 E. 4. 36.

17. If a feoffment in fee be made on condition to be void upon payment of money at a day, albeit convenient time before sun-set be the last time given to the feoffor to tender, yet if he tenders it to the person of the mortgagee at any time of the day of payment, and he refuses it, the condition is saved for that time. Co. Litt. 207. b.

18. A. covenants at 2 years end to procure a deputation &c. for 7 years for J. S. In this case A. must procure it immediately after the 2 years are expired, that J. S. may not lose the profits thereof afterwards. Cro. J. 297, 298. Hill. 9 Jac. in Cam. Scacc. *Barwick v. Gibson*.

28 how.
143. pl. 119.
S. C. ad-
judged for
the plaintiff.

20. Condition in consideration of a marriage had with the daughter of the obligor, to pay to W. L. the husband, his executors, &c. 300 l. within 2 months after the death of the obligor, if the said daughter, or any issue of hers by her said husband be living at the death of the obligor. W. L. died intestate, then the wife died leaving a daughter, then the mother the obligor died; in debt upon this bond, defendant pleaded that *there was no executor, and that administration of W. L.'s goods &c. was not granted till 12 months after the obligor's death*; and upon demurrer adjudg'd for the plaintiff, because the money being a duty, the defendant should have pleaded uncore prius. Raym. 416. Mich. 32 Car. 2. B. R. Lee v. Garret.

* [205]

But there might have been a difference between this case and the case of a common mortgage, as to redemption, after the legal estate absolutely vested in the mortgagee, had C. been to come here for relief against the heir at law; but here C. comes for relief against a 3d person, who had the estate vested in him for no other purpose but to make the estate redeemable. Per Lord C. Parker. 10 Mod. 424. Mich. 5 Geo. 1. in case of Marks v. Marks.

21. Devise of lands to his wife for life, and after her death to D. his 3d son, and his heirs provided that if C. the 2d son, should within 3 months after his wife's death pay to D. his executors &c. 500 l. then the lands should come to C. and his heirs. The testator died; the * wife died. Ld. C. Parker thought that C. had an equity of redemption that remained open to him in a court of equity, as well after the time limited as before. 10 Mod. 419. 424. Mich. 5 Geo. 1. Marks v. Marks.

(M. b. 2) Performance. At what Time, after Refusal. Good in what Cases. And Pleadings.

1. A Man seized of a manor with advowson appendant infeoff'd three, upon condition that they, or any of them, who survive, or their heir, within 40 days next after 10 years next ensuing the date of the deed, re-infeoff J. and E. his feme in tail, the remainder to R. A. in fee, and they made a deed accordingly, with letter of attorney to W. P. to deliver seisin, and deliver it in the county of E. such a day, within the 40 days, and commanded him to make the feoffment accordingly, which attorney such a day and year at the manor offer'd to the baron, to make estate within the 40 days, according to the deed and condition, and the baron refus'd, and also the attorney was upon the manor all the 40 days ready to have made livery, and for the non-performance of such condition the feoffor re-enter'd; and per Newton, if the baron and feme die within the 40 days, there the feoffees ought to make the estate to R. to whom the remainder is limited, and if all should die within the 40 days, the feoffor may re-enter; for the feoffor shall not lose the land where the condition is not performed, and no default in the feoffor. And so it seems, that where time is limited, if a man refuses at one time, he may agree at another day within the time, and all well; quære. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76.

2. Debt upon obligation with condition, that if the defendant renounced all his interest that he had in the administration of the goods of J. S. before the official of the bishop of N. secundum legem, that then

then &c. And said, that he had refused and renounced according to the condition. Pigot said, that this is no plea without shewing when; for if he renounced, pending the writ, it shall not save the penalty, quod tota Curia concessit; by which he shew'd that he renounced such a day before the writ purchased, which was held a good plea. Pigot replied, that after the making of the obligation, and before this day, which he supposes the renouncing, the plaintiff at R. in the county of N. prayed the defendant to renounce according to the condition, and the defendant refused. And per tot. Cur. where a man is bound to pay money, or make a scoffment, or renounce an office, or the like, and no day is limited when he shall do it, there upon a request he is bound to perform it in as short a time as he can; but where day is limited to pay &c. and he refuses before the day, it is not material if he performs it at the day; quod nota diversity; by which he said, that he performed the condition, absque hoc, that he refused at the time supposed by the plaintiff. Pigot said, that this is no plea; for though he did not refuse at the time of the request made, yet he is bound to perform the condition immediately after the request, in as short a time as he can, and therefore no plea. Quære, because the court arose and went away. Br. Conditions, [206] pl. 65. cites 15 E. 4. 30.

3. Where no day is limited, there the first refusal determines the condition for ever. Contra where day is limited, and the condition is performed by the day; and disagreement to a stranger is not material; contra to the party. Br. Conditions, pl. 67. cites 14 H. 8. 17.

4. Grant was made by lessee of a term, on condition lessor should assent by such a day. The lessor refused to assent at one time, yet he may give it at another, so as it be before the day. But if no time was limited, then one express denial or refusal would be peremptory, so as the refusal was expressed to the party to whom the assent was to be given; otherwise if it were but in common talk to or among strangers. Went. Off. Ex. 226. cites it as held 14 H. 8. 23.

(N. b) [Performed.] How.
[As to Time and Place.]

[1.] If the condition be to be performed at a day certain, it is not necessary for the obligor to be there all the day. Contra 21 E. 4. 52.]

Br. Conditions, pl. 174. cites S. C. & S. P. by Choke, that he ought to say, that he was there all the day, and that the plaintiff nor any other was ready to receive it, and that he is yet ready; quod omnes iudicarii concesserunt.

[2. If the condition be to stand to the award of B. to be made such a day; if he does not make the award at the day, but at a day after, he is not bound to perform it. 49 E. 3. 9.]

[3. If the condition be to make an obligation to the obligee by the advice of J. S. of 40 l. immediately, yet he shall have reasonable time to do it by the advice of J. S. 18 E. 4. 21.]

See (F. c) pl. 2. S. C. Debt upon obligation, that the defendant shall make

make obligation to the plaintiff by advice of W. N. of 40 l. immediately; and per Brian, Choke, and others, he may say, that the first bond was made such a day and hour, and that he such a day and hour after made obligation of 40 l. by advice of W. N. and shall not speak of this word immediately, and good; for it cannot be done immediately; for he ought to have space to have the advice of W. N. and after to write and seal it. Br. Conditions, pl. 164. cites 18 E. 4. 21.

Br. Condi-
tions, pl. 65.
cites S. C.
See (F. c.)
pl. 2, S. C.

[4. Where by condition a thing is to be performed upon demand, yet he shall have reasonable time to perform it after demand. 15 E. 4. 30.]

[5. If A. recites by his deed, that whereas he is indebted to B. in 100 l. he covenants with B. that the said 100 l. shall be paid and delivered to B. or his assigns at Rotterdam in Holland per C. absque aliqua secta legis super primam requisitionem quæ de eodem faceretur. In this case the demand may be made in any other place præter Rotterdam, for though the payment is to be made at Rotterdam, yet the demand may be made in any place, and if the demand be made in England, or at Dort, which is 10 miles from Rotterdam, or in England, [it is good] for he ought to have reasonable time to pay it after the demand, having respect to the distance of the place; but if the demand should be limited to Rotterdam perhaps he would never come there, and so the covenant would be of no effect. Mich. 1650. between Haisted and Vauleyden, adjudged upon a special verdict.]

[207] 6. If a man is bound to pay 10 l. before Christmas, and he pays it after Christmas, and the obligee accepts it, yet the obligation is forfeited. Br. Conditions, pl. 212. cites 14 H. 8. 13.

Cro. E. c. 49.
pl. 24. Ed-
monds v.
Marks, S. C.
adjudg'd for
the plaintiff.
7. Debt upon an obligation to be such a day at the King's Head in B. and there to chuse two arbitrators, to join with two others, to be chose by the obligee, to arbitrate all matters betwixt them. The defendant said, that he was there at the last instant to make the choice. Adjudged no plea; for he ought to have been there in such time that they might have chosen arbitrators, and have finished matters the same day. Mo. 545. pl. 725. Mich. 39 & 40 Eliz. Marsh v. Edmonds.

(O. b) At what Place where none is limited.

[1.] IF the condition be, that a stranger shall shew certain evidences of such an annuity to the counsel of the obligee upon request; when the request is made, the stranger ought to seek the counsel where they are. 19 E. 4. 1. 6.]

2. If A. is bound to pay B. 20 l. on B's first coming to such a place, this place shall be taken for the place where the payment shall be made; per Popham. Poph. 11. Arg.

(P. b.) [In what Cases it must be performed.] To the Person.

As an ob-
ligation of
20 l. for the
payment of
10 l. M. S. 340. — Br. Conditions, pl. 166. cites 20 E. 4. 1. Per Brian & Cur. S. P.
[1.] IF the condition be to pay a small sum, and no place is limited, he ought to seek the obligee. 21 E. 4. 6. b.]

[2. If

[2. If the condition be to do a thing upon request, and the plaintiff assigns for breach that the defendant could not be found to make a request to him, and therefore be made a proclamation at the church where he was born, and another proclamation in several markets in the same county, by then giving notice of his request; yet this was not any request, in as much as it ought to be made to his person. Mich. 8 Car. B. R. between *Gruit and Pinnel*; adjudged upon demurrer.]

[3. If a man leases, rendring rent, and the lessee binds himself in 20 l. to perform the covenants, this does not alter the place of payment of the rent; for it may be tender'd upon the land, without seeking the obligee. 21 E. 4. 6. 20 E. 4. 18 b. Fitzh. Debt. pl. 97. cites S. C. but not exactly S. P. Debt upon indenture of

lease, rendring rent, in which the defendant bound himself by indenture to pay 40s. *toties quoties* the rent be arrear; and the defendant pleaded payment in another place; and per Littleton, Pigot, and Brian, the payment suffices upon the land; and the same law of a request there, and of a tender there; the reason seems to be, in as much as it is all by one and the same indenture, and therefore the penalty is of the nature of the rent. *Contra* it seems if he was bound by obligation. Br. Conditions, pl. 169. cites 20 E. 4. 18.—Br. Tender, pl. 23. cites S. C. & S. P. accordingly; but Brooke says it seems e contra of a collateral obligation.

[4. [So] if the lessee binds himself to pay a greater sum, if he does not pay the sum reserved at the day, yet he is not bound to make tender in another place than upon the land. 21 E. 4. 6. b.] [208]
Fol. 444-
Fitzh. Debt, pl. 97. cites S. P. but not exactly S. C.

5. Note, that the obligor or mortgagor is bound to seek the obligee or feoffee to make to him a tender, if he be within the realm where no place certain is limited. But he is not bound to seek for him out of the realm; and therefore it seems that it is a good plea, that he was not within the realm at the time, &c. Br. Conditions, pl. 200. cites Littleton, Chap. Estates.

6. A. is bound to deliver to the obligee 10 bushels of wheat, and no place is limited where the payment shall be. A. is not bound to seek the obligee wheresoever he shall be, as he shall in case of payment of money; for the insupportableness of it shall excuse him; per Clark, which Manwood granted. 3 Le. 260. pl. 347. Mich. 32 Eliz. Obiter, in the Exchequer. 4 Le. 46. pl. 122. S. C. & S. P. by Clark and Manwood. — Co. Litt. 210. b. S. P. and so of so many

any load of timber, &c. but the obligor or feoffee before the day must go to the obligee, &c. and know where he will appoint to receive it, and there it must be deliver'd; and so note a diversity between money and things ponderous or of great weight.

7. Homage, or any other corporal service, must be done to the person of the lord, and the tenant ought by the law of convenience to seek him, to whom the service is to be done, in any place within England. Co. Litt. 211. a.



Q 4

(Q. b) [At]

(Q. b.) [At what Place it must be performed.]
Where a Place is limited.

Br. Condi- [1. IF the condition of an obligation be to pay 10 l. at a day at S.
tion, pl. 21. he is not bound to pay it in any other place. 41 E. 3. 25.]
cites S. C.

& S. P. but

if the obligee accepts it at any other place it is good. — Fitzh. Dette pl. 121. cites S. C. & S. P. by
Finch. — P. if he pay it by the day; per Prisot, quod non negatur. Br. Conditions, pl. 15.
cites 34 H. 6. 17. — See (X. b) pl. a. S. P. — See (S. c) pl. 11. S. C.

* Br. Con- [2. So in such case, the obligee is not bound to receive it in any
ditions, pl. other place upon a tender. 41 E. 3. 25. * 46 E. 3. 4. b. 11 H.
21. cites 4. 62.]
S. C. but

S. P. does

not appear. — Fitzh. pl. 121. cites S. C. and S. P. by Finch. — See (S. c) pl. 11. S. C.

† Br. Defeasans, pl. 14. cites S. C. which was of an indenture of defeasance of a statute merchant,
that if the conusor pay 10 l. at B. that then, &c. The conusee is not bound to receive it in another
place; but if he does receive in another place it is sufficient; quod nota. — Fitzh. Audita Querela,
pl. 1. cites S. C.

3. Upon a statute merchant the *defeasance* was to make payment at
B. and the party paid at T. and yet well, because the conusee re-
ceived it. Br. Tender, pl. 3. cites 4 E. 3. 4.

Br. Dette, 4. Payment at another place than is comprised in the condition of
pl. 43. cites the obligation is good. Br. Tender, pl. 5. cites 46 E. 3. 29.
S. C.

5. If A. is bound to pay 10 l. to J. N. at E. such a day, and he
accepts it at another place, he shall be barred by the acceptance, and
yet at first he was not bound to accept it, but at E. only. Br.
Barre, pl. 27. cites 21 H. 6. 24. Per Markham.

[209] 6. If the condition of an obligation be to pay such a sum at Pauls in
L. yet it suffices if it be paid at any other place. Br. Lieu. pl. 33.
cites 15 E. 4. 8.

7. If a man be bound in a bond to pay 20 l. the obligor, in whose
discharge the condition goes, ought to be ready at the place &c. all
the day, and the obligee may come any time of the day. Br. Con-
ditions, pl. 192. cites 32 H. 8.

Mich. 7. 8. James earl of Anglesea, upon his marriage with lady Cath-
Geo. in erine, daughter of the countess of Dorchester, made a settlement of
Canc. Wm. lands in Ireland, wherein, after the usual limitation in tail male,
Phipps, Esq. and lady there was a term of 500 years raised, in trust for raising 12000 l. for
and lady Catharine daughters portions to be paid at 18 years of age, or day of marriage
his wife by &c. Earl James died without issue male, leaving the plaintiff, lady
Sir Constan- Catherine, his only daughter, and by his will devised to her 3000 l.
tine Phipps, to be added to her portion, and 300 l. per ann. increase of maintenance,
their Pro- which was only 100 l. per ann. by the marriage settlement, and
chein Amy appointed her guardians by the will; two of the guardians died
v. the earl soon after earl James, the surviving guardian being Francis An-
of Anglesea nelley esq; and there being a suit in chancery in relation to the
& al'. guardianship of the young lady, the court did commit her to the
care of Mr. Francis Annelley, with this caution, that he should
not treat of, or contract any match for her, without the leave and
approba-

approbation of the court. The young lady was sent by Mr. Annelley in 1718 to her aunt, the lady Christian Geare, to be with her during the summer at her house near Windfor. While the plaintiff, lady Catherine, was with her aunt there, the plaintiff Mr. Phipps, being with his father in the neighbourhood, got acquainted with the young lady, and made his addresses to her, and got her away from her aunt, and married her privately, without the consent or privity of any of her friends or relations; and now both the plaintiffs being under age, bring their bill by their prochein amy, to have the interest of the portion and legacy paid to Mr. Phipps the husband, and to have the portion itself, and the legacy given her by her father's will, laid out in land, and settled upon her and her children, in such manner as the court should think proper.

1st point was, if the 12000 l. *portion charged upon the term of 500 years, of lands in Ireland, without impeachment of waste, should be paid here in England, without any allowance or deduction for the exchange from Ireland to England?*

It was urged by the defendants counsel, that the money being to be raised out of lands in Ireland, and no place appointed by the settlement for the payment thereof, it was payable in Ireland where the lands lay out of which it was to be raised, and not in England, and therefore if the plaintiffs would have it paid here, they must allow for the exchange, and that seems to be the intention of the parties; for *in that part of the settlement which secures a rent-charge of 2000 l. per annum for the jointure of the wife, it is expressly provided for, that the rent should be paid at London without any abatement or deduction for the exchange, but in the declaration of the trust of this term, those words are omitted, and it is only said, in trust to levy, raise, and pay out of the premises the sum of 12000 l. of good and lawful money of England &c.* Now the different penning of these clauses, shew the intention of the parties to be different, viz. that in the one case the money should be paid without deduction for the exchange, and in the other case not so; and that this 12000 l. portion being to be raised out of lands, ought to be paid where the lands lie, no place in particular being appointed for the payment thereof.

Per contra, it was argued that this portion of 12000 l. ought to be paid in England where the settlement was made, and not in Ireland, where the lands lie out of which it is to be raised; that the *settlement was made in England, and the parties resided here; that this is a sum in gross charged upon land, and not a rent issuing out of land, that a tender of rent upon the land is sufficient, but a tender of a sum in gross charged upon land must be made to the person who is to receive it, whereforever he is to be found, and that the reason of the different penning of the clauses, viz. that of the jointure, and this of the portion is, that the jointure is a rent-charge, and consequently payable upon the land, unless another place be particularly appointed for the payment thereof; but the portion being a sum in gross, though charged upon land, is payable to the person of the grantee where she resides and is to be found, and therefore no occasion* [210.]

casion to add the words without deduction for the exchange, because the money is payable here. If a man in England lends money here, and takes a mortgage of lands in Ireland for a security, the money is to be paid here where it was lent and the contract made, and not in Ireland where the lands in mortgage lie, and there is no difference between these two cases.

Parker C. was of opinion that the portion ought to be paid here where the contract was made and the parties resided, and not in Ireland where the lands lie charged with the payment thereof; for that this is a sum in gross, and not a rent issuing out of land, and it was certainly the intention of the parties that the portion should be paid here, and not to send the young lady over into Ireland to get her portion.

(R. b) [Disjunctive. Performance.] How. [*What shall be a saving of the Condition.*]

Br. Conditions, pl. 274. cites S. C. but S. P. does not clearly appear.

[1.] If the condition be to pay 10 l. at D. such a day, or 10 l. at S. such a day; if he tenders it at D. the first day the condition is sav'd. 21 E. 4. 52.]

2. There is a difference between disjunctive absolute and disjunctive contingent; as if a man be bound to pay 10 l. or to infeoff one upon the return of J. S. from Rome. If J. S. die before he return from Rome the obligation is saved though the 10 l. be never paid; but if it be a voluntary act as to pay 10 l. or to infeoff you before Michaelmas, there if the obligor dies before Michaelmas, yet his executors ought to pay the money; per Popham Ch. J. Goldb. 192. pl. 141. Hill. 43. Eliz. Anon.

[211]
See Parols
(D)

(S. b) What shall be said a Condition in the Disjunctive.

Where a man is bound to do one thing or another thing, and the one is possible, and the other impossible, he ought to perform that which is possible. Br. Conditions, pl. 47. cites 21 E. 3. 25.

As in debt A. was bound to J. in 100 l. to infeoff J. or the heirs of his body when he comes to his aunts, and said, that such a day he came to his aunt, and J. required him to infeoff him, and he refused. Skipwith said that here the plaintiff alleges two points in the condition, viz. that A. infeoff him or the heirs of his body, but does not allege breach of the other point; and here A. may infeoff J. but he cannot infeoff the heirs of his body; for he has no heirs in his life, and therefore though he cannot infeoff the heirs, &c. he ought to infeoff J. himself, and because he did not, he shall forfeit his obligation; quod nota; and the time is certain, viz. when he comes to his aunt's, and the condition is in the disjunctive to do the one or the other. Br. Conditions, pl. 47. cites 21 E. 3. 25. — S. C. cited Pl. C. 289. a. Trin. 7 Eliz. in case of Chapman v. Dalton, and says, that the sense of the words are to be taken to infeoff the plaintiff if he be alive, and if he was dead, then to infeoff his heirs, and therefore the defendant was driven to answer to the count. — A man covenanted to infeoff J. S. and

and his heirs, whereas it is impossible to infee his heirs while J. S. himself is living; and therefore it shall be taken for a disjunctive. *Ow. 52. Mich. 29 & 30 Eliz. Arg. cites it as Chapman's case—S. C. cited Gouldsb. 71. in pl. 16.*

[2. *As if the condition be that he and his executors shall do such a thing; this is in the disjunctive, because he cannot have an executor in his life-time. 21 E. 4. 44 b.]*

[3. *So if the condition be, that he and his assigns shall sell certain goods; this is in the disjunctive, because both cannot do it. 21 E. 4. 44.]*

4. *Lease reserving rent before Michaelmas a pound of pepper or saffron. Before the feast lessee has election which to pay, but after the feast lessor may have debt for which he please. D. 18. a. pl. 104. Trin. 28 H. 8.*

A. covenanted with B. *to make a lease for years of lands to B. and his assigns*; the same shall be construed (or) his assigns; and so the copulative shall be taken as a disjunctive; *Arg. Le. 74. pl. 101. cites Pl. C. 289. 7 Eliz.*

6. Condition of a bond was, that the obligor *should bring in the son and daughter of J. B. at their full age to give releases*, as a third person should require. This must be taken to be at their respective ages. *Vent. 58. Hill. 21 and 22 Car. 2. B. R. Bolvill v. Coates.*

had been only, viz. (when they shall come to their ages of, &c.) it were enough to have the condition understood respectively; because they cannot come to their ages at one and the same time; and adjudged accordingly.

7. *A lease was made to T. and E. (whom T. afterwards married) if he and she, or any child or children between them, should so long live; afterwards E. died without issue. All the judges agreed, that the lease was not determined by the death of the wife; and judgment accordingly. Ow. 52, 53. Mich. 29 and 30 Eliz. Cooke v. Baldwin.*

word (or) is distributive and to be applied to any one of the three, and Anderson said, that this was the opinion of all the justices of England.—And 161. pl. 206. S. C. adjudged and agreed in C. B. that the word (and) viz. (if he and the) notwithstanding it be copulative, shall be taken disjunctively and that the lease continues; for it appears that this lease was made for the benefit of the same who intended to marry with T. which benefit in effect she should not have if by the death of T. she should lose her estate &c.—*Gouldsb. 71. pl. 16. S. C. adjudged accordingly.* And Periam, Windham and Anderson said, that it appears by the disjunctive sentence, which comes afterwards, that the intent was, that the lease should not determine by the death of one of them, and the reason which moved the lord Anderson to think so was because the lease was made before the marriage, and so it was as a jointure to the wife, and consequently not determined by the death of one of them.—*Le. 74. pl. 131. S. C.* Anderson said it would be in vain to name the wife in that lease, if the lease should cease by the death of the husband; and adjudged that the lease was not determined by the wife's death.—*S. C. cited Cro. E. 270. pl. 11. as adjudged, and says, that Anderson commanded Nelson the prothonotary to enter upon the record that the lease continued so long as any of them live.—S. C. cited Le. 244. pl. 330. says the husband held the land though the wife was dead; for the disjunctive (or) before the word (child) made the sentence disjunctive; and Gawdy J. said this had been law if so such word had been in the case.—Co. Litt. 225. a. S. C. says the disjunctive refers to the whole, and disjoins not only the latter part as to the child, but also to the baron and feme; so as the same is, if the baron or feme, or any child, shall so long live.—And so if an use be limited to certain persons till A. shall come from beyond sea, and attain his full age or die. If he comes from beyond sea, or attains his full age, the use ceases. Co. Litt. 225. a. cites it as adjudged. Hill. 35 Eliz. B. R. lord Mordaunt v. Vaux.—*Cro. E. 269. pl. 11. lord Vaux's case S. C. & S. P. agreed.—Le. 245. pl. 330. S. C. argued; sed adjournatur.**

8. A. and

Eophr. 200. 8. A. and B. lease for years, and covenant that lessee may enjoy
Saunders v. free from all *incumtrances made by them*, and afterwards lessee is
Meriton disturbed by J. S. to whom A. had made a precedent lease, it is a
S. C. states breach; for (*them*) shall be taken severally and not jointly only.
it, that it Lat. 161. Trin. 2. Car. Meriton's case.
was from
all incum-
brances
 made by them or any other person, and therefore extends as well to incumbrance made severally as
 jointly. — Noy 86. S. C. resolved accordingly, but seems misprinted in two words, viz. (Alien)
 (for enjoy) and (debt) for (covenant.)

9. If a condition be *to make an assurance of land to the obligee and his heirs*, and the obligee before the assurance made dies, yet the assurance shall be made to the heir; for this copulative is a disjunctive; per Allibone J. 3 Mod. 235. Trin. 4 Jac. 2. B. R.

3 Chan.
 Rep 206.
 S. C.

10. Legacies to four grand-children on condition, that *as they come of age they should release* all claims to the testator's estate; this condition must be taken distributive, and such only as refuse to release shall forfeit their legacies; per Wright K. 2 Vern. 478. pl. 432. Hill. 1704. Hawes v. Warner.

See Tit.
 Fovols (E)
 (F).

(T. b) Perform'd. At what Time it shall be.
 Where a Day is limited.

[1.] *F a latitat* to arrest J. S. be *returnable die lunæ prox' post crastinum sanctæ Trinitatis*, which this year was the 10th of July, and the sheriff arrests him the 10th of July, and takes an obligation from him the same day, with a condition to appear coram domino rege *die lunæ prox' post crastinum sanctæ Trinitatis* ad respondend &c. it seems he ought to appear the same day, and not this day twelve-month. Trin. 3 Jac. B. R. between May and Hooper, dubitatur.]

[2. If the condition of an obligation be *to pay 8 l. annuo domini 1599, in and upon the 13th day of October next after the date* hereof at D. &c. where the 13th of October next after the date is a long time before 1599, yet it shall be paid in 1599, and not before; for it appears the intention was, that it should be paid in 1599, and this is first expressed; and therefore if the subsequent words, upon the 13th of October next after the date hereof, are contrary, they
 [213] shall be void; but it seems they may be interpreted, that it shall be paid the 13th of October, which shall be anno domini 1599 next after the date thereof, and so all may stand together, otherwise not. Mich. 37 & 38 Eliz. B. R. between Hankinjon and Rile, per Curiam.]

[3. If A. be obliged to B. the 1st of May, upon condition to pay to him 10 l. at the feast of St. Michael, without saying more, it shall be intended the feast of St. Michael next ensuing. Mich. S. P. — 12 Jac. B. between Lewkner and Smallwood, adjudged.]
 And it shall be intended

St. Michael the Archangel which is the most notable, and not St. Michael in Tymba. Br. Jours, pl. 5. cites 20 H. 6. 23. — 2 Inst. 485, 486.

4. *Tenant in dower granted her estate to him in reversion by deed, rendering rent, and for default of payment a re-entry, and the tenant in dower for the rent arrear at the first term immediately entered, and the heir who had the reversion tender'd her the rent and re-enter'd, and the tenant in dower brought assise, and the opinion of the court was with the tenant. Quære causam it seems in as much as she re-enter'd without demand, quære.* Br. Tender, pl. 40. cites 44 Aff. 3.

5. Where a man is bound by indenture or obligation to pay 10 L at a day, and pays it after the day, this does not excuse the forfeiture; by all the justices. * Br. Conditions, pl. 60. cites 22 H. 6. 57.

6. Debt of 20 l. by obligation, which was, that *the obligee shall receive 5 l. by the hands of A. when K. comes to his house, and at Michaelmas 5 l. and at St. Andrew then next following 5 l. and at Christmas then next &c. 5 l.* And as to that which A. should pay, and which should be paid by the hands of A. this is void, and *shall be paid immediately* by the obligor; but by the words that it shall be paid when K. comes to his house, therefore it is not payable till he comes to his house. And per Brian, as to the words (and 5 l. at the feast of St. Michael then next following) by this he shall pay 5 l. at next Michaelmas after the making of the obligation, by reason of these words, then next following; for *if those words (then next following) had been left out*, it should be Michaelmas next after the coming of K. to his house, quod tota curia concessit. Br. Obligation, pl. 56. cites 20 E. 4. 17.

7. An obligation to be paid at dooms-day is payable presently. D. 93. b. pl. 28. Marg. cites Pl. C. 192. and 6 Rep. 36.

8. Bond to pay money at the feast of our Lady, without mentioning nativity, conception or annunciation; per tot. Cur. the deed shall be construed to intend such Lady-day which should next happen and follow the date of the said obligation. 3 Le. 7. pl. 10. 6 Eliz. B. R. Anon.

Br. Jura, pl. 5. cites 20 H. 6. 234 that if he does not shew what feast, it is said not to be good.

9. An obligation was condition'd that *if A. deliver to B. 20 quarters of corn 29 Feb. next following the date thereof, than then &c.* The next February had but 28 days. It was held that A. is not bound to deliver the corn until such a year as is leap-year, and then he is to deliver it, and the obligation was held good. Le. 101. pl. 132. Pasch. 30 Eliz. B. R. Anon.

10. If I am bound in an obligation in Lent, upon condition to pay a lesser sum in quarta septimana quadragesimæ proxime futuræ, this money shall be paid in Lent twelvemonth after; per Coke. Gouldsb. 137. pl. 40. Hill. 43 Eliz.

11. And so it is upon the feast day of St. Michael, if I am bound to pay a lesser sum upon the feast day of St. Michael prox' futur', without question it shall be paid the twelvemonth after, and not the instant day; per Coke. Gouldsb. 137. pl. 40. Hill. 43 Eliz.

(T. b. 2) Performance. At what Time. Where a Thing is to be done on or before such a Day.

No. 122. pl. 266. Anon. S. P. and seems to be S. C. and Anderson Ch. J. held that if he tenders it the last instant of the 28th day, he has saved his obligation; for he intends that if this word (*before*) may receive any good construction, it is not the office of the judges to make it to be void, and he thought that this word continues [or takes in] all the time from the date of the obligation till the 1st instant of the 29th day, and that this is reasonable; and argued that where a man has liberty of time to do an act, that he shall do the act in the last instant of the time, and therefore the tender on the last instant of the 28th day shall save the obligation; but the other judges held e contra, and thought that the word (*before*) is not to have any construction, but that the obligor shall thereby be admitted to pay before the day by agreement of the obligee. But the reporter says quare, for this seems no more than is given by the law.

1. DEBT upon an obligation, condition'd to pay at or before the 29th of September next, at such a place 10 l. to the obligee. It was held by the court that if the obligor tenders the money the 28th day of September at the place, and the obligee is not there to receive it, it is a void tender, for the tender is to be the last day; but if the obligor * meets the obligee at the place before the day, and he then tenders it, this is sufficient, and the obligee ought to receive it. Cro. E. 14. pl. 1. Paſch. 25 Eliz. C. B. Hawley v. Simpson.

* Co. Litt. 211. a. S. P. S. P. by Clench J. who said that perhaps at the last day the obligor may not find the obligee. Cro. E. 73. in case of Allen v. Andrews.

2. Debt upon obligation, conditioned to pay 14 l. yearly to the party during the life of the wife of the defendant, at Mich. or within one month after at D. The defendant pleads that 2 days before the end of the month he came to D. and there tendered the 14 l. and there was none to receive it; the justices held that if the tender had been to the plaintiff himself in person within the month, if he had come thither, this peradventure had been good, but it seemeth hard to tender it when the plaintiff was absent, and to compel him to attend all the month was not reasonable. But by Wray, it is more reasonable that the last day shall be for one to tender and the other to receive, but they were in doubt of this case; but afterwards it was adjudged for the plaintiff. Cro. E. 73. pl. 31. Mich. 29 & 30 Eliz. B. R. Allen v. Andrews.

(U. b.) Performed. At what Place it ought to be. Where none is limited.

Fol. 445.

[1. IF the condition of an obligation be to perform covenants, of which one is, that whereas he is a common surgeon, and had taken J. S. to be his apprentice, he covenants to instruct him in his trade, and to keep him in domo sua propria & servitio; if he after sends the apprentice to the East-Indies in a voyage to exercise his trade, this is a forfeiture of the obligation, because he cannot send him out of the realm for the danger thereof, for this is not any keeping in domo sua propria & servitio. Hill. 14 Jac. B. Coventree against Boswell adjudged.]

Hob. 134. pl. 189. Coventry v. Woodhall, S. C. adjudged. Brownl. 67. Coventry v. Windal, S. C. adjudged. See (S. C.) pl. 2. S. C.

2. But

[2. *But* in this case it was agreed per Curiam, that he may, without forfeiture of the condition, send him to any place in England to cure a patient.]

Hob. 134.
pl. 180. Co-
ventry v.
Woodhall,
S. C. & S. P.

———Brownl. 67. S. C. & S. P.

[3. [*But*] if an apprentice be bound to a merchant, and the master binds him with such words ut supra, he may send him over the sea; for this is his trade, and incident to it. This was so agreed in the said case.]

Hob. 134.
pl. 180.
S. C. &
S. P. —

Brownl. 67.
S. C. & S. P.

[4. If an annuity be granted upon condition to do service to the grantor, and to counsel him in time of war and peace, and after the king warns the people to go with him into Britany, upon which the grantor goes there with the king, and warns the grantee to go with him &c. If he refuses, the condition is broke, though it be out of the realm, because the word war, which cannot be properly within the realm, implies as much. Dubitatur, 17 E. 3. 26.]

[5. *But* if the condition had been to serve him, and counsel him generally, he had not been bound to go with him out of the realm, because of common right, a man is not to travel out of the realm. 17 E. 3. 26. admitted.]

[6. If a man mortgages land, upon condition to enter upon payment of 10 l. he may tender it upon the land, without seeking the person of the mortgagee, because this is to be paid in recompence, in lieu of the land. 11 H. 4. 62. b. per Skreene. 19 H. 6. 50. b. per Fortescue. Litt. 78. Quære.]

Litt. S. 240.
S. P. and
says the
opinions as
to this point
were dif-
ferent. —
Co. Litt.

110. a. in his Commentary on the said section observes, that Littleton always sets down the better opinion, and his own last, and that so he does here; for at this day, Coke says, this doubt is settled, it having been oftentimes resolved, that seeing the money is a sum in gross, and collateral to the title of the land, the feoffor must tender the money to the person of the feoffee, and that it is not sufficient for him to tender it on the land. But if the feoffee be out of the realm of England, he is not bound to seek him, or to go out of the realm unto him.

[7. If a man releases all his right in the land, upon condition if he pays the other 10 l. such a day, the release shall be void; it shall be paid upon the land, or to his person. * 317 E. 3. † 17 Aff. 2.]

* This is
misprinted,
and should
be 17 E. 3.
16. —

† Br. Conditions, pl. 103. cites S. C. — Br. Tender, pl. 17 cites S. C.

[8. In this case the payment should be made in what place his person could be found. 17 E. 3. 16.]

[9. If a man makes a feoffment reserving a rent to a stranger, and for default of payment, that it shall be lawful for the feoffor to re-enter, this is not any rent, because it cannot be reserved to a stranger, and therefore the feoffee ought to tender the sum to the person of the stranger where he may be found, otherways the condition is broke. Litt. 80.]

10. Where an act is to be done at a place, as to come to D. and there to repair my Hall, this is material. Br. Conditions, pl. 103. cites 17 Aff. 1.

(X. b) At what *Place* it ought to be performed, where a *Place* is limited.

[1. IF the condition of an obligation be *to appear coram justiciariis apud Westmonasterium*, he ought to appear in B. and not in B. R. for this is not the stile of the king's bench. Hill. 14 Jac. B. R. between *Musgrave and Robinson*, per Curiam.]

* Br. Conditions, pl. 103. cites S. C.—

[2. If a *place of payment* be limited by a condition, he is *not bound to pay it in any other place*. 17 E. 3. 16. 42. b. * 17 Aff. 2.]

Br. Tender, pl. 17. cites S. C.—See (Q. b) pl. 1. S. P.

* Fol. 446.

Sec (Q. b) pl. 2. S. P.

[3. [And] if a place be limited by the condition where it shall be performed, *the * other is not bound to receive it in another place*. 17 E. 3. 2. b. 3. 16. 17 Aff. 2.]

[4. *As* if a release be upon condition of payment of 20 l. to another at D. he is not bound to receive it out of D. upon a tender to his person. 17 E. 3. 2. b. 15. b.]

[5. *So* if the condition be *to come to the releasee at D. to help him with his counsel*; it is not performed if he tenders his counsel at the day at another place. 17 E. 3. 2. b.]

[6. If the condition be *to pay* a small sum of money at such a place, the obligee is not bound to receive it in another place. 21 E. 3. 45.]

(Y. b) *How* a Condition is to be performed, where *divers Things* are [*or the same Thing is at different Times*] to be performed in the *Disjunctive*.
[*Election*.]

And. 49. pl. 124. Cage v. Furtho, S. C. adjudged for the plaintiff, and the

plaintiff need not make any request, but the defendant at his peril ought to have made the lease for 21 years before the said feast.—S. C. cited 2 Saund. 131. Pasch. 22 Car. 2.

[1. D Y. 18 Eliz. 347. the condition of an obligation was, if the obligor before Michaelmas make a lease to the obligee for 31 years, if A. will assent, and if he will not assent [then] for 21 years, then the obligation shall be void; and A. would not assent. A lease for 21 years ought to be made before Michaelmas.]

Br. Conditions, pl. 161. cites

S. C. but S. P. does not appear.

[2. If the condition be *to infeoff* the obligee of D. or S. the obligor hath election. 18 E. 4. 17. b.]

[3. *So* if the condition be *to infeoff* him of D. or S. upon request, the obligor hath election. 18 E. 4. 17. b.]

[4. The *same* law if it be *to pay* 20 l. or a pint of wine, upon request. 18 E. 4. 17. b.]

[5. The

Condition.

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[5. The same law if it be to shew evidences to the obligee or his counsel, upon request made by the obligee. * 18 E. 4. 17. 20. b. 161. cites S. C. but where it is

thus, viz. debt upon obligation with condition, *that if the defendant shews his evidence of such rent to the plaintiff's counsel, or does such other act as he shall be required by the plaintiff*, that then, &c. and said, that the plaintiff required him to shew it to his counsel at B. such a day, and the defendant was there all the day, and the plaintiff's counsel came not; judgment, &c. and it was agreed, that when the condition is in the disjunctive, the obligor has the election to do the one or the other; for the condition is in the advantage of the obligor. Br. Conditions, pl. 161. cites 18 E. 4. 15. 17. 20. And per Brian and Choke J. fol. 17. this request given to the plaintiff does not take away the election from the defendant but is only to limit the time when the condition shall be performed; but yet the election shall remain to the obligor sicut prius. Ibid.

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[6. The same law if it be to cut 20 acres of meadow or corn upon request. Dubitatur, 18 E. 4. 20. b.]

[7. The same law if it be to go with me or my wife to church upon request. 18 E. 4. 21.]

[8. The same law if it be to go to York, or marry my daughter, upon request; for in all these cases the * request is of no other effect but to appoint a time when the obligor shall do the one or the other. 18 E. 4. 21.] * See the notes at pl. 5. supra.

[9. A. covenants with B. to discharge him from the wardship of his body at his age of 21 years, or before upon the request of B. Quære which of them hath the election, if B. requests before 21. D. 1, 2. Ma. 108. 32.]

[10. If I am obliged in 10 l. to pay 5 l. at the feast of P. next &c. or before, at the request of the obligee, the obligor hath given his consent, that the obligee shall have the election in this case. D. 1, 2. Ma. 108. 32.]

[11. But otherwise it is, if the words are *retrosum*, as if the condition be to pay 5 l. before the feast of P. at the request of the obligee, or at the feast of P. there the obligor hath the election. D. 1, 2. Ma. 108. 32.] D. 108. b. pl. 32. S. C. says only, that it seems the obligor has the election.

[12. D. 20 Eliz. 361. 9. Windsor, bargainee of land for 60 l. by another indenture, covenants to make back to the bargainor and his heirs, such assurance as the counsel of the bargainor shall devise, within one year after, provided that if the vendee makes default in the assurance, then if he does not pay 500 l. to the vendor, that he shall stand seised to the use of the vendor; the vendor does not tender an assurance, and the 500 l. is not paid; per Curiam the vendee hath a right to the land, because it was the folly of the vendor, that no assurance was devised and notified to the vendee, and therefore there was no default in the vendee.]

13. Debt upon an obligation to pay 20 l. or 20 bales of wool, and he demanded the 20 l. And per Pigot and Brian, before the day of payment the obligor has election to tender which of them he will, but after day of payment, and no tender made, there is election in the obligee or grantee to demand which of them he will; but where a man is bound to pay 10 l. at Easter, or 10 l. at Michaelmas, he has election to pay at the one day or the other. Br. Dette, pl. 159. cites 13 E. 4. 4.

14. The testator devised a house to W. S. upon condition that he see my mother well provided for during her life, or give her 20 l. &c. The jury found that the mother lived with S. for 2 years, and that she was well provided for during such time, but that afterwards she went from him, and then was not provided for, and that she requested the 20 l. but S. refused. The whole court held that S. had his election either to pay her the 20 l. or to provide otherwise for her; and that by having suffered her to dwell with him 2 years, he had made his election, and it was her folly to leave him, for now he is not obliged to pay the 20 l. &c. But had the jury found that he had turn'd her away after the 2 years, he must pay the 20 l. Palm. 76. Hill. 17 Jac. B. R. Shaw's case.

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2 Roll. Rep.
215. S. C.
The judges
at first
doubted but
afterwards
it was ad-
judged for
the plain-
tiff.

15. Debt upon obligation, the condition was, that if he paid to A. or his heirs annually 12 l. at Midsummer, or Christmas, or paid to him or his heirs at any of the said feasts 150 l. then &c. Upon demurrer it was objected that defendant had election at any time to pay the 12 l. or 150 l. and so no breach so long as he liveth; but per tot. Cur. the obligation is forfeited. It is true he hath election to pay the one or the other; but for as much as he hath not alledged payment of the 12 l. or the 150 l. the bond is forfeited, and judgment for the plaintiff. Cro. J. 594. pl. 15. Mich. 18 Jac. B. R. Abbot v. Rockwood.

2id. 27. pl.
2. Soome v.
Glean. Hill.
12 Car. 2.
C. B. the
S. C. but is
only as to
the point
whether
such a bond
is usurious
or not, and
held that it
is not.

16. Debt on bond conditioned, that if a ship at sea, or the goods therein, or the obligor returned safe, then to pay so much money. The defendant pleaded that the obligor died before he returned, and the plaintiff demurred; for the money was to be paid upon 3 contingents, the return of the ship, or of the goods, or of the obligor, which being all, the law supplies these words, viz. (which shall first happen) and so the money is to be paid at such contingent which first happens and forecloses the election of the obligor, and gives it to the obligee to take his action upon the contingent first happening; resolved, and judgment for the plaintiff. Lev. 54. Hill. 13 & 14 Car. 2. B. R. Sayer v. Glean.

17. Debt upon bond for 40 l. condition'd that if the defendant should work out 40 l. at the usual prices in packing &c. when the plaintiff should have occasion &c. to employ him, or otherwise shall pay the 40 l. then the bond to be void. The defendant pleads that he was always ready to have worked out the 40 l. but that the plaintiff never employ'd him. But upon demurrer the plea was held ill, because the defendant did not aver that the plaintiff had any occasion to make use of him, and for that it was in the election of the plaintiff either to have the work or money, and that by not employing him, but bringing an action for the money, he has determined his election to have the money, and judgment accordingly for the plaintiff. 2 Mod. 304. Pasch. 30 Car. 2. C. B. Wright v. Bull.

18. If A. obliges himself to pay to B. 10 l. or so much as J. S. shall appoint, if J. S. will not appoint any sum to be paid, A. shall pay the 10 l. per Powel J. Lut. 694. Trin. 9 W. 3.

(Y. b. 2) Condition Copulative. What is; and how to be performed.

1. IF I am bound to J. N. in 40 l. upon condition *to infeoff him before Christmas*, and that then the obligation shall be void, *and that if he does not infeoff him &c. if he pays him 10 l. at Easter then next &c.* that then the obligation shall be void; if I do not infeoff him at Christmas my obligation is forfeited, which cannot be saved by the payment afterwards, for that which is once *forfeited cannot be saved afterwards*, per Brudnel, which Brooke in a manner affirmed. Br. Conditions, pl. 66. cites 14 H. 8. 15.

2. *Otherwise it is*, as it seems, if the condition had been in the *disjunctive* and not in the copulative as before; but Brooke makes a quere of the first case, because he says it seems to him, that a man may make several defeasances of one and the same obligation, and if any of those be observed it is sufficient. Ibid.

3. If a man mortgages his land to W. N. upon condition, that if the mortgagee and J. S. repays 100 l. by such a day, that he shall re-enter, and he dies before the day, but J. S. pays by the day, the condition is performed, and this by reason of the death of the mortgagor, notwithstanding that the payment was in the copulative; and e contra if it was not in the case of death. Br. Conditions, pl. 190. cites 30 H. 8. [219]

4. Debt upon bond conditioned, *that the plaintiff should enjoy such lands until the full age of J. S. and if J. S. within one month after his full age, make an assurance of the said lands to the plaintiff the obligee, that then &c.* The defendant pleaded, that J. S. is not yet of full age; but because he did not answer whether he had enjoyed it in the mean time, and the condition is in the copulative, it was adjudg'd for the plaintiff. Cro. E. 870. pl. 4. Hill. 44 Eliz. B. R. Waller v. Croot.

5. The defendant covenanted, *that he or his son R. or either of them, shall work with the plaintiff in grinding and polishing of glasses, paying to each of them so much*, and in an action of covenant brought he assigned the breach, *that he had required R. the son to work, and tendered him so much, &c.* After verdict it was moved in arrest, that the declaration was of a request to R. only, who is a stranger to the covenant, and no notice given to the covenantor himself, and the covenant is in the disjunctive (or) and the words (either of them) is the same as (one of them;) but Glyn Ch. J. said, that the word (either) by our books, may be taken conjunctive or disjunctive, and often has reference to more than two, and that the words (each of them) would have been more proper here; and so it seems that the action is well brought, and that the plaintiff had his election; and judgment for him. 2 Sid. 107. Mich. 1658. B. R. Neale v. Reeve.

(Z. b) How a Condition is to be performed, where several Things are to be performed in the Disjunctive. In what Cases he ought to make a Tender [or Request.]
[Election.]

[1.] IF the condition of an obligee be, that if the obligor delivers certain obligations to the obligee before such a day to be cancelled, or else if he seal a deed or release of all actions which the obligee shall cause to be made by the advice of his counsel, and shall deliver it to the obligor to be sealed before the day aforesaid, &c. In this case both are in the election of the obligor; for if the obligee does not deliver to him any release to be sealed by him, he is not bound to deliver the obligations, for both are only in his power. H. 38. El. B. R. between *Greningham and Ewer*; and H. 39. El. adjudged per Curiam, contra Popham.]

Cro. E. 396. pl. 1. S. C. adjormater —Ibid. 539. pl. 1. Hill. 39 Eliz. S. C. adjudged by 3 J. Popham e contra, who said, that if it were an absolute disjunctive condition that the obligor should do the one thing or the other, then the election would be to the obligor absolutely; and if the obligee disables himself to perform the one part, the law shall discharge him of the other; but here it is only a conditional election, viz. if the obligee will devise an acquittance; and if he will not devise it, he is absolutely obliged to deliver the obligations —Mo. 395. pl. 515. *Grimminham v. Ewer*, S. C. says it was resolved that the first part of this condition made a condition clearly, and the second gave a disjunctive election to the obligor upon a contingency precedent, viz. upon devise of an acquittance by the counsel of the obligee before the day aforesaid; but though there be not any such devise, yet the obligor must perform the first part of the condition; and if such acquittance be devised, then the obligor has election to perform which he please; but this is no discharge of both for want of an acquittance devised by the obligee's counsel. —Gouldsb. 142. pl. 55. S. C. Gawdy held the obligation void, because an acquittance not being tendered by the obligee, he has taken away the election from him whereof he shall not take advantage, but Popham and Fenner e contra; for the election is not in the party, the making of the acquittance resting in the will of the obligee, and so the obligor has no election. —Poph. 98. *Grimminham v. the executors of Heydon*, S. C. but is only stated there. —S. C. cited 2 Mod. 201. —3 Mod. 214. Argues S. C. as adjudged that the defendant had election to deliver or release as the plaintiff should devise, which if he will not do the defendant is discharged by the plaintiff's neglect; for the defendant being at his choice to perform the one or the other it is not reasonable that the plaintiff should compel him to perform one thing only. —2 Mod. 203. S. C. cited per Cur. and held to be law.

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[2.] In this case if the obligee had delivered to him a release to be sealed by him, then he ought to have had his election either to deliver the obligations to be cancelled, or to seal the release. H. 38 El. Cur. —Cro. B. R. per Popham.]

E. 396. pl. 1. S. C. & 539. pl. 1. S. C. and S. P. admitted.

[3.] So if the condition of an obligation be to deliver to the obligee such obligations before such a day, or to pay him 10 l. if he requests it; if he does not request the 10 l. the obligor ought to deliver the obligations, for he hath no election till request made; but after request made, he hath election which of them he will do. Hill. 38 El. B. R. per Popham.]

Cro. E. 396. pl. 1. and 539. pl. 1. S. C. but I do not observe S. P. —But ibid. Popham said, that if the condition had been, that he should deliver the obligation, or should make an acquittance before Mich. if the plaintiff should require it, it had been clear that he ought to deliver the obligations, unless the obligee required an acquittance. But Gawdy said, that there is great difference between the cases; and therefore it was adjudged for the defendant.

Condition.

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4. Condition of a bond was, *to pay to S. 20 kine, or 30 l. within a month after the death of his mother, at election of S.* The obligee makes *no election* in the time. Per tot. Cur. election must be made within the month, and convenient time allowed for the provision of one of the things. Mo. 241. pl. 377. Mich. 29 Eliz. Kerne's case. Le. 69. pl. 92. Basset v. Kerne, S. C. and the court was clearly of opinion that the plaintiff should be barr'd.—Cro. E. 119. pl. 6. Shepherd v. Kerne, S. C. adjudged against the defendant.

5. And per Windham J. if the condition be *to pay 20 l. in gold or in silver such a day, at the election* of obligee, the obligor is not bound to provide both; but Anderlon and Periam J. thought, in such case, that after the day the bond might be su'd, and the obligor should pay the 20 l. be it in gold or in silver, because it was *parcel of the obligation*; but it seems to be otherwise of a *thing collateral* which is not parcel. Mo. 241. in Kerne's case.

—But where the condition was to pay the obligee 20 kine, or 30 l. such a day, *at the then election of the obligee*, the court agreed, that the obligor ought to tender both at the day appointed, the words being, *at the then election*; for the word (then) shall be referred to the day of payment. But had the word (then) been left out it had been otherwise. Mo. 246. pl. 387. Mich. 29 Eliz. C. B. Anon. —Le. 68. pl. 88. Fordley's case, S. C. adjudged clearly. —Le. 70. pl. 92. S. C. & S. P. by Windham J. but if the obligee does not make his election before the day, yet the duty remains payable; for the thing to be paid is parcel of the penalty; quod fuit concessum.

6. Bond conditioned *to settle on obligee within 6 months, as obligee's counsel should advise, an annuity of 20 l. per annum during his life, or else to pay him within 6 months 300 l.* The defendant pleaded, *that the obligee had not tendered any grant of an annuity within the 6 months.* The whole court held the plea good, because the defendant had the benefit of election, and the plaintiff not making the request within the 6 months, had dispensed with one part of the condition, and the law had discharged the defendant of the other part; and judgment was given for the defendant. 2 Mod. 200. Hill. 28 and 29 Car. 2. C. B. Basset v. Basset. Mod. 264. Basset v. Basset, S. C. adjudged nisi &c. per tot. Cur. præter Windham. —Freem. Rep. 228. pl. 276. S. C. says the court inclined,

that this being a disjunctive condition, and one part being impossible by the obligee's default, the obligor was excused from performing the other, because he has election which he will perform, and the benefit thereof shall not be taken away by the obligee's own act, and it plainly appears that the 300 l. is by way of penalty, it being twice the value of the annuity.

(Z. b. 2) Where it is to do one of two Things; [221]
and Pleadings in copulative or disjunctive Conditions.

1. **I**N trespass the defendant said, that his franktenement; the plaintiff said that he was seised in fee, and infeoffed the defendant in fee, upon condition to say mass and dirge, and ring the bells to it such a day quolibet anno pro anima, J. N. &c. and because he did not ring nor say mass be re-entred, and was seised till the defendant did the trespass. The defendant said that he had performed all as he ought, and shewed how. And the plaintiff said that he did not say mass, and the other e contra; and after he amended his paper, and said that he did not ring to the dirge, and good; for the issue shall be

Condition.

upon one point only; for the condition is a copulative. *Contra* upon a disjunctive, for there the feoffee has election. *Contra* upon a copulative. Br. Conditions, pl. 95. cites 38 H. 6. 26.

2. Debt upon bond, conditioned, that *whereas certain persons became bound to the earl of Holland in 8 several bonds, which were assigned to the defendant to his own use; Now it was agreed that he should assign them to the plaintiff to his own use, and the defendant covenanted that the money should be paid on the several days mentioned in the bonds, or within 8 days after; the breach assigned was, that 50l. payable on the 1st day of March was not paid, and found for the plaintiff; but it being moved that the replication was insufficient, because it might be paid within the 8 days, and also that the condition was for maintenance, and so the bond void, and judgment was stayed.* All. 60, Pasch. 24 Car. B. R. *Hodson v. Ingram.*

3. Where a condition is in the disjunctive, and *one part of it is falsified* (as in the principal case it was by defendant's demurrer) the plaintiff must have judgment, and it was given accordingly, 8 Mod. 349. Pasch. 11 Geo. 1. *Griffith's case.*

(A. c) Disability [to perform the Condition, and what shall be said a disabling himself.]

[1,] If a man promises to perform an award, which is, *that he shall deliver up a certain obligation to the other, in which the other is bound to him, without limiting any time when it shall be performed; if he brings an action of debt upon the obligation, and recovers, and after delivers up the obligation, yet it is not any performance of the condition, but is broke, because he ought to deliver it up as it was at the time of the award made; for the recovery in the mean time is a deceit, and a disability of itself by his own act to perform it.* Trin. 15 Jac. B. R. between *Nicklas and Thomas* adjudged.]

[2. If the feoffee upon condition to re- infeoff the feoffor infeoff a stranger upon condition to perform the condition, yet the condition is broke, because the feoffee hath disabled himself to do it. 38 Ass. 7. per Mowbray.]

[222]

Br. Conditions, pl. 217. cites S. C. and says, that if the feoffee suffers a recovery against him and will not plead in bar the feoffor may re-enter; for thereby the feoffee has disabled himself to make a re-feoffment.

[3. If there be feoffee upon condition to re- infeoff, or to infeoff a stranger, and after another recovers the land against him by default, yet till execution sued the condition is not broke, for before execution he is not disabled, for perhaps he will never sue execution, and if he sues execution after he has made the feoffment according to the condition, the feoffor may re-enter, for the condition broke. * 44 Ass. 26. Curia, † 44 Ed. 3. 9. b.]

† Br. Conditions, pl. 26. cites 44 E. 3. 8. S. C. and the feoffor may enter upon the feoffee; for the recoverer has disabled himself by uttering the false recovery, and especially if execution on the recovery had been sued against the feoffee, the feoffor has good cause of entry; contra if it was upon good title and by ordinary writ. — Fitzh. Entre congeable, pl. 33. cites Pasch. 44 E. 3. 8. S. C. — If such feoffee suffers a recovery by default upon a feigned title, the feoffor may re-enter for this disability before execution sued. Co. Litt. 222. o. cites S. C.

[4. If

[4. If the feoffee upon condition to re-*infeoff* &c. grants a rent-charge out of the land; this is a forfeiture of the condition, because he is disabled to make a feoffment of the land as it was at the first & S. P. and feoffment. * 44 Aff. 26. † 44 E. 3. 9. b. per Pearsey; and if the feoffor should accept the re-feoffment, he should be subject to the charge.]

* Br. Conditions, 217. cites S. C. & S. P. and bound in a statute, &c. for by those acts he has

disabled himself to make a re-feoffment, and says that Littleton in his book, Title Estates, is accordingly.

† Br. Conditions, pl. 26. cites S. C. & S. P. that if the feoffee charges the land the feoffor may re-enter. — Fitzh. Entre congeable, pl. 33. cites 44 E. 3. 8. S. C. — In such case the feoffor may enter, and so defeat the charge. Litt. S. 358. — Co. Litt. 222. a. says it is to be understood, that the grant of the rent charge is a present disability; and therefore though the grantee brings a writ of annuity, and so discharges the land of it ab initio, yet the case of entry being once given by the act of the feoffee, the feoffor may re-enter; and that so it is if the rent-charge was granted for life, and the grantee had died before any day of payment, yet the feoffor may re-enter.

Where a man is bound of covenants to *infeoff* J. N. of the manor of D. and after grants a rent-charge out of it, and makes the feoffment, the bond is not forfeited; per Keble and Fairfax, to which the justices in a manner agreed. Br. Conditions, pl. 126. cites 3 H. 7. 14.

5. In debt, a man was bound in 100 l. to appropriate the advowson of D. to the house of C. by such a day at the costs and charges of the obligor, and a pension was assigned out of it after; and after this the obligor appropriated it; and per Keble and Fairfax J. the obligation is not forfeited. Br. Conditions, pl. 126. cites 3 H. 7. 14.

6. A tenant in dower of land where trees were growing, which it was lawful for her to cut, covenants with B. (the reversioner) that it should be lawful for B. every year to cut 20 trees. A. destroys and cuts all the wood; this is a breach. Mo. 18. pl. 65.

7. If I give licence to take a deer in my park every year, I cannot dispark my park; otherwise if I give licence to hunt only; per Dyer. Mo. 19. pl. 65.

8. Lessor covenants that if lessee surrender the old lease at any time during his life, he will make a new lease for a greater number of years. Lessor grants the reversion over, lessee need not now surrender his lease, but may bring covenant, because the lessor has disabled himself. 5 Rep. 20. b. Pasch. 38 Eliz. B. R. Sir Anthony Mayne v. Scott.

Mo. 493. pl. 619. S. C. in debt on bond for performance of covenants adjudged in C. B. and affirm'd in

B. R. — 2 And. 18. pl. 12. S. C. and the court held the bond forfeited. — Cro. E. 450. pl. 27. Scot v. Mayne, S. C. in C. B. adjudged and affirmed in error in B. R. — Cro. E. 479. pl. 12. S. C. resolved by all the justices without any great argument, that the defendant having disabled himself by this fine to make the lease according to the covenant, and because the plaintiff is not to make the surrender but with an intent to have a new lease, which, now he cannot have, it would be in vain for him to offer his surrender, but the covenant is broken of itself, and so the judgment was affirm'd. — Poph. 109. S. C. and judgment affirmed. — Jenk. 256. pl. 49. S. C. adjudg'd, and affirm'd in error. — S. C. cited 2 Roll. Rep. 347, 348. — S. C. cited Raym. 36. — S. C. cited Hard. * 387. — And suppose it be but a term to begin at a day to come, yet by this the obligation is forfeited, because the obligor has thereby disabled himself to perform the condition in such a plight as he might have done it when the obligation was made. Poph. 110. pl. 6. Mich. 38 & 39 Eliz. per Cur. in case of Scot v. Mayne.

* [223]

9. If a man grant an advowson upon condition that the grantee shall regrant the same to the grantor in tail, in this case if the church become void before the regrant, or before any request made by the grantor, he may take advantage of the condition; because the ad-

R 4

vowson

vowson is not in the same plight as it was at the time of the grant upon condition, and so it was resolved; therefore the grantee in that case at his peril must regrant it before the church become void, or else he is disabled; otherwise he has time during his life if he be not hastened by request. Co. Litt. 222. b.

10. Lessee for years covenanted to do for lessor all reasonable works with his carts, carriages, and otherwise as he should require; and in covenant brought by the lessor, he assigned the breach, that he had required the lessee to carry 3 loads of coals for him to such a place, which he refused to do, and did not do it. *Lessee pleaded that he had no carts or carriages at the time.* Lessor demurred. Jermin held that the lessee is not bound to keep carts to serve the lessor; but when he has, then, if the lessor requires &c. he is to do it, and Jones seem'd to incline to this opinion. Lat. 202. Mich. 2 Car. Manners v. Vesey.

11. A bond by a widow was condition'd to make farther assurance of lands &c. upon request at the charges of the obligee. The obligee tender'd an assurance which differed in the limitation of the estate from what was mentioned in the condition, whereupon the widow refused to sign it, and afterwards married; the question was, whether the marriage was a breach of the condition, and it was argued that it was because she cannot execute any conveyance now but by fine, and it being to be done at the charge of the obligee, he may now be put to more charge, whereas had she been single, the obligee might have been contented with a feoffment, or a lease and release, but she is now disabled by her own act to convey the lands in the same plight they were in before she married, and conditions must be performed in every circumstance where the default is in the party herself. The court advised the defendant to make a good conveyance, that being the intent of the parties; and here the obligee is prejudiced by the marriage, and put to greater charge for the conveyance. Hard. 463. pl. 1. Trin. 19 Car. 2. in the Exchequer. Edwards v. Owen.

Skin. 40.
in pl. 8.
S. P. Arg.

12. If lessee covenants to leave all the timber which is growing on the land leased upon the land at the end of the term, if lessee cuts it down, though he leaves it on the land, it is a breach of his covenant. Raym. 464. Pasch. 34 Car. 2. B. R. in case of Griffith v. Goodhand. per Cur.

So if a covenant be to deliver a horse, and the defendant poisons and then delivers him, covenant lies.

13. If I covenant to deliver so many yards of cloth, and I cut it in pieces and then deliver it, it is a breach of my covenant; for the law regards the real and faithful performance of all contracts, and discountenances all such acts as are in fraudem legis. Raym. 464. Pasch. 34 Car. 2. B. R. in case of Griffith v. Goodhand. per Cur.

Arg. Skim. 40. in pl. 8.

(B. c.) How

(B. c) How to be performed; [or rather, in what Cases it cannot be performed by reason of the] Fol. 448.
 Obligor, [or Feoffee being] disabled. [*Though re-enabled afterwards.*]

[1. **I**F a day be limited to perform a condition, if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broke. 21 Ed. 4. 55.]

[2. As if the condition be to infeoff before Michaelmas; if before the feast he infeoffs another, though he after re-purchases, yet he cannot perform the condition. 21 E. 4. 55.]

S. P. 5 Rep. 21. a. & S. C. cited per Cur. & 32 E. 3.

Tit. Bar. 264. because he was once disabled to make the feoffment.

[3. So where no time is limited, if the obligor once disables himself, he is perpetually disabled. 21 E. 4. 54. b.]

S. P. where no time is limited by the parties,

but the time is appointed by the law. Co. Litt. 221. b.——S. P. by Fenner J. and the court accordingly. Bulst. 117. Patch. 9 Jac. Anon.

[4. As if the condition be, that A. shall suffer B. to recover in a formedon brought by B. against A. and that then B. shall infeoff A. if B. be nonsuit in this formedon, he hath disabled himself to recover and make the feoffment. 21 E. 4. 55.]

[5. If feoffee upon condition to infeoff another infeoffs a stranger, this is a forfeiture, because he hath disabled himself. 19 H. 6. 34. b.]

Litt. S. 353. S. P. and that so it is if the feoffee makes a

lease for life.——Co. Litt. 220. b. 221. a.——If a man is bound to infeoff B. by a day, and he infeoffs C. who infeoffs B. by the day, yet he has forfeited the obligation, for he ought to have done it himself; per Keble. Br. Conditions, pl. 127. cites 4 H. 7. 3.

6. In debt, A. was bound to B. by obligation in 100 l. upon condition that if the said A. after the death of his father, and within 3 months after, made sufficient estate in such land to a feme, that then &c. Per Fisher J. if the baron after the marriage had leased the lands to a stranger for one month, remainder to the feme in fee; this had been a good performance of the condition. Quære inde, tamen non negatur. Br. Conditions, pl. 127. cites 4 H. 7. 3.

7. If a feoffment is made by A. to B. upon condition to infeoff J. S. before a certain day, and B. before the day is professed a monk. A. may enter presently into the land, and notwithstanding that B. is deraign'd before the day, yet the condition shall not be revived. Perk. S. 801.

Co. Litt. 225. b. S. P.

8. So if the feoffee was sole at the time of the feoffment, and before the day, or the condition perform'd, he takes a wife &c. Perk. S. 801.

Litt. S. 357. S. P. and the feoffor and his heirs may enter

presently, because she will be intitled to dower after the death of her husband.——Co. Litt. 221. a. S. P.——And tho' she dies before the husband so as this possibility took no effect, yet the feoffor may re-enter. Co. Litt. 221. b.——10 Rep. 49. b. S. P. and says the reason is, that the law has principal regard to the original and fundamental cause.

A divor³

The reason is, for that, as Littleton says, immediately by

9. A *diversity* is to be observed *between a disability for a time on the part of the feoffee, and on the part of the feoffor.* Co. Litt. 221. b.

the disability of the feoffee the condition is broken, and the feoffor may enter; but it is not so by the disability of the feoffor or his heirs, for if they perform the condition within * the time it is sufficient, for that they may at any time perform the condition before the day; so it is if the feoffor enter *into re-fig on*, and before the day is *deraigned*, he may perform the condition for the cause above mentioned; *et sic de similibus.* Co. Litt. 221. b. 222. a.

* [225]

10. If a man makes a *feoffment* in fee, upon condition *that if the feoffor or his heirs pay 100 l. before such a day &c.* The feoffor [before the day] commits *treason*, and is *attainted and executed*, now is there a disability on the part of the feoffor, for he hath no heir; but *if the heir be restored before the day* he may perform the condition, as it was resolved Trin. 18 Eliz. C. B. in *Sir Thomas Wiat's case*, which lord Coke says he heard and observed; otherwise it is if such a disability had grown on the part of the feoffee. Co. Litt. 221. b.

U. P. resolved per
rec. Cur.
2 Rep. 59. b.
Mich. 40
& 41 Ellis.
B. R. the
3d resolution
in *Winning-
ton's case.*
—Jenk.
253. pl. 44.
S. C. & S. P.
resolved.

11. If the feoffee is *disseised*, and after binds himself in a *statute staple*, or merchant, or *recognizance*, or takes wife, this is no disability in him, because during the *disseisin* the land is not charged therewith, neither is the land in the hands of the disseisor liable thereunto. And in that case, if the wife dies, or the conusee releases the statute or recognizance, and after the disseisee enters there is no disability at all, because the land was never charged therewith, and therefore in that case the feoffee may enter and perform the condition in the same plight and freedom as it was conveyed unto him. Co. Litt. 222. a.

Comb. 299.
S. C. but
S. P. does
not appear.

12. Where a *personal notice* is necessary, and the plaintiff by his *act in absconding* had prevented it, so that it could not be given, the defendant was not bound to seek the plaintiff to give notice. 1 Salk. 214. Pasch. 6 W. 3. B. R. *Nurse v. Frampton.*

(C. c) What shall be a Disability.

Br. Condi-
tions, pl. 26.
cites S. C.
—Fitzh.
Entre con-
geable, pl.
33. cites Pasch. 44 E. 3. S. S. C.

[1.] If a *stranger recovers* by real action *against feoffee* upon condition *to re-infeoff*; this is no disability of the feoffee before *execution sued*, for perhaps he will not sue execution. 44 E. 3. 9. b.]

Br. Condi-
tions, pl. 26.
cites S. C.
—Fitzh.

[2. But if he that recovers *sues execution*, or enters upon the feoffee, the condition is broke, for he is disabled. 44 Ed. 3. 9. b.]
Entre congeable, pl. 33. cites Pasch. 44 E. 3. S. S. C.

Br. Condi-
tions, pl. 26.
cites S. C.
—Fitzh.
Entre con-
geable, cites Pasch. 44 E. 3. S. S. C.

[3. So if after such recovery the feoffee makes a *re-feoffment*, and after he that recovers enters upon him, or *sues execution*, now the condition is broke, and the feoffor may re-enter. 44 Ed. 3. 9. b.]

[4. If

[4. If an annuity be granted till he is promoted to a benefice, if the grantee takes a wife, the annuity is determined, because by the marriage he is disabled, & lex non cogit inutile, scilicet, to proffer it to him. 7 H. 4. 16.]

5. In debt A. was bound to B. by obligation in 100 l. upon condition that if the said A. after the death of his father, and within three months after, made sufficient estate in such land to a feme, that then &c. The obligor himself married the feme; this is clearly a forfeiture of the obligation. Contra if the obligee had married her. Br. Conditions, pl. 127. cites 4 H. 7. 3. [226]

6. He, who is bound to carry my corn, cannot say that he has no cart. Br. Barre, pl. 111. cites 16 H. 7. 9. per Keble,

7. So where a man is bound to mow my grass, it is no plea that he has no scythe. Ibid.

•(D. c) What Thing will excuse the Penalty of the Obligation only.
Acts of the Obligee.

[1. IF the condition be to pay a small sum, and the obligee refuses it at the day; this saves the penalty, but he ought to pay the small sum notwithstanding. * 20 E. 4. 1. b. dubitatur. 22 E. 4. 26.]

in the condition is not lost by the tender and refusal, not only because it is a duty and parcel of the obligation, and therefore is not lost by the tender and refusal, but also for that the obligee has remedy by law for the same. Co. Litt. 207. a.

[2. So it is, though there be a place limited for payment, and the obligee refuses it. D. 3. 4. Mar. 150. 84. Contra 22 E. 4. 26. Contra † 7 H. 4. 18.]

Temp. Prist, pl. 35. cites 5 H. 4. 18. S. P. [but it seems misprinted and should be 7 H. 4. 18. as in Roll, and so are the other editions.] — Br. Tender and refusal, pl. 6. cites S. C. [but the point of the penalty being saved does not clearly appear in either of the two last books.]

3. In debt, if the defendant be bound to the plaintiff in 20 l. to pay 10 l. such a day, and the defendant tenders it at the day, and he receives part, and of the rest he respites the receipt thereof till agreement be made between them; and after the plaintiff at another day required payment, and he refused, yet the defendant shall not forfeit the penalty, for this is saved by the first offer. Br. Conditions, pl. 145. cites 7 E. 4. 3.

4. Where an obligation is made, and afterwards a defeasance is made thereof if he pays a lesser sum &c. there by a tender of the lesser sum the obligor is discharged of all; but otherwise it is of an obligation with a condition to pay a lesser sum. Cro. E. 755. pl. 16. Pasch, 42 Eliz. C. B. Cotton v. Clifton.

See Tit.
Tender (N.)
(Q.) (R.)
See Tout
Temp. Prist.
(D) &c.

* Br. Touts
Temp. Prist.
pl. 31. cites
S. C. —
The sum
mentioned

† Br. Con-
ditions, pl.
38. cites
S. C. —
Br. Touts

(E. c) *Perform'd.* At what *Time* it shall be, *if no*
[or an uncertain] *Time be limited.* And what not.

Br. Obliga- [1. I F the condition be to pay *when he comes to his house*, it shall
tion, pl. 56. be paid when he comes there, and not before. 20 E. 4. 18.]
cites 20 E.

4. 17. S. C.

and after the words (when he comes to his house) the condition went on, viz. *and at Michaelmas 5 l. and at St Andrew's day then next following 5 l. and at Christmas then next, &c. 5 l.* Brian* said, that as to the words (and 5 l. at Michaelmas, &c. then next following) *he shall pay it at the next Michaelmas, &c.* after the making the obligation by reason of those words (then next following;) for had the words been omitted the payment should be at the Michaelmas next after the coming to his house; quod tota curia conceffit.

If a man be bound in 20 l. that *if he goes to Rome that the obligation shall be void*, or if he *infects the obligee*, &c. in this case he shall have all his life to do it. Br. Conditions, pl. 14. cites 33 H. 6.

47. —But Brook says, *quære inde* and see T. 9 E. 4. 22. that *upon request he shall do it immediately.* Ibid.

* [227]

2. The condition is, that *if goods are esloined that then he shall satisfy*, that is, *as soon as the goods are esloigned.* Br. Conditions, pl. 14. cites 33 H. 6. 47.

{ Fel. 449. (F. c) [Performed.] How, [and when. The Time
not being certainly fixed. And where a Refusal or
Acceptance shall be peremptory.]

S. C. cited [1. D. 19 Eliz. 354. 32. A fine levied by Edward Barrowes to
per Cur. 8 Anthony Barrowes to the uses in an indenture, where
Rep. 92. b. was a proviso, if Edward Barrowes pays or tenders 20 l. during his
—S. C. life at the Font stone in the church of S. to Anthony, that it should be
cited Cro. to the use of Edward in fee; by three justices a tender of the said
E. 298. pl. sum at the said place is void, if he gives not notice to Anthony,
9. per Pop- that he or his deputy may be there to receive it, because no day
ham. — certain was appointed.]
S. C. cited, Arg 2 Bulst. 147.]

S. C. cited 3 Bulst. 306. Arg. —S. C. cited Arg. Palm. 434. —S. C. cited per Cur. 13 Rep. 2. —Co. Litt. 211. a. S. P. and cites S. C. —Cart. 93. Arg. cites S. C. —Mo. 6: 21. pl. 833. Trin. 42 Eliz. in Canc. lady Burgh's case, alias, Burgh v. William, S. P. held accordingly by the judges of Serjeant's inn in Chancery-lane, on a reference by the lord chancellor, and so certified by them.

Where an estate is vested to be devolved by the tender of any sum to any one, and no time is limited; in this case the tenderer must give notice. Jenk. 325. in N. arg. of pl. 39.

So where an obligation is conditioned to pay money at any time during his life at a place certain, the obligor must give the obligee notice on what day he will pay it; but in this case as well as in the case of a feoffment as above, if at any time the obligor or feoffor meets the obligee or feoffee at the place, he may tender the money. Co. Litt. 211. a. —S. P. as to an obligation, Cro. E. 14. pl. 1. per Cur. Paich. 25 Eliz. C. B.

Br. Condi- [2. Where a condition by the exposition of the law is to be per-
tions, pl. 65. formed upon demand, yet he shall have a reasonable time to perform
cites S. C. but he ought it after demand. 15 Ed. 4. 30.]
to do it in as
short time as he can. —(N. b) pl. 4. S. C.

[3. [And]

[3. [And] where it is to be performed in a reasonable time after demand, by the exposition of law, *if upon demand he refuses*, the condition is broke, *although he performs it after within such reasonable time* as would have been a good performance, if there had been no refusal. 15 Ed. 4. 30.]

[4. So if the condition be *to do a thing at a day which shall be assigned*; if he does not perform it at the day assigned, he cannot perform it after. 18 E. 4. 15.]

[5. If the condition be, that there shall be a *contract upon the liking or disliking* upon the view [if he] once likes or dislikes, he cannot alter it, for otherways there would be no end; but *otherways* it is * *where a day is limited*; there if he likes or dislikes before the day, yet he may alter it at the day. † 46 E. 3. 5. b. 14 H. 8. 23. b.]

† Br. Conditions, pl. 30. cites S. C. and also 14 H. 8. 22. S. P. accordingly. cites S. C. Fitzh. H. Dett. pl. 133. * [228]

(G. c) [Performance.] What will excuse the Performance of a Condition.

Acts of God.

[And how he shall perform it afterwards.]

[1. *Regularly*, if a condition, which was possible at the making thereof, becomes impossible by the act of God, the obligation is discharged.]

condition that the scoffee shall go to Rome, &c. and he dies in the voyage, I may re-enter, because the condition is not perform'd. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76. per Pafton. — See pl. 8. and the notes there. — See (I. c) pl. 1. S. P.

[2. If a man be let to mainprize, it is a good plea at the day * (Y. c) pl. when the manucaptors ought to have the body &c. for the manucaptors to say, that he who was let to mainprize *was dead before the day*, so that they could not have his body at the day. * 21 E. 4. 70. b. Curia. Contra † 21 E. 3. 51. b. scilicet, that this cannot be averred by the manucaptors, but it *ought to come in by return of the sheriff* upon a capias against him and the manucaptors.]

day, if A. dies before the day, &c. the bond is saved. Arg. Palm. 514 cites 31 H. 6. Bar. Condition, that J. S. shall bring sureties, and J. S. dies, the bond is discharged. Ibid. cites 15 H. 7. 2.

[3. But it is clear by these books, that *his death excuses* the manucaptors, Mich. 32, 33. El. B. R. between Warter plaintiff, and Perry and Spring defendants, per Curiam.]

the principal was dead the day of judgment given; because it goes in avoiding the judgment, and proves it to be erroneous, which cannot be avoided but by error; but that they might plead the death of the defendant before the sci. fa. and after the judgment, for then they could not bring in the body; but afterwards the plea was received, because they cannot have a writ of error to reverse the judgment. — 2 Le. 101. pl. 125. S. C. says it was ruled, that the defendant should be sworn that the plea was true. — See tit. Bail. (Y) per totum. —

[4. If

• Fitch. Ac. [4. If A. agrees with B. to give him eight marks, to serve him
 five, pl. 102. three years, and because he hath not the money ready, in surety of
 cites S. C. payment he enfeoffs him of lands in fee, upon condition, to continue
 — Br. till the eight marks are paid, &c. and after A. dies within three
 Conditions, weeks after this agreement, yet his death shall not excuse the pay-
 pl. 106. cites ment of the eight marks; for the heir cannot enter before payment
 S. C. and thereof, or raising thereof out of the land. 21 E. 3, 11, b. * 21
 was to se- the payment of Ass. Pl. 18.]
 cure the

21. to B.
 on his taking A. to be his apprentice for 3 years; and A. died within 3 weeks, yet the heir of A. can-
 not enter till the 21. is paid, but after the money is levied he may, Brooke says, quod nota; for the
 condition on the seoffment was only for the 21. and not for instructing A. — Br. Affice, pl. 230.
 (229) cites S. C. —

[229]

Roll. Rep. [5. If A. recovers a debt against B. in Banco, and B. brings a
 329. pl. 36. writ of error, and finds manucaptors to prosecute with effect, an
 Fol. 450. after dies before the * return of the writ. This act of God will ex-
 cuse the manucaptors. Hill. 13 Jac. B. R. between Sir Tho. Mid-
 dleton, and Twinie, per Curiam.]

S. C. and in

sci. fa. 2-

against the bail, the court thought that the plea was not good, and judgment was given for the plaintiff
 accordingly against the manucaptors.

See tit. Bail.

(C) pl. 1.

S. C. and

the notes

there.

[6. If a man becomes bail for another in an action, and after the
 plaintiff recovers against the principal, and the capias against him is
 returned non est inventus, and this is filed, and after the principal
 dies before any scire facias sued against the bail; yet this shall not
 excuse the bail, in as much as he died after the capias returned
 and filed; (yet it seems, that after this, and before the return of
 the scire facias, the bail is excused de gratia, by bringing him in.)
 Trin. 5 Jac. B. R. between Timberly, and Bootbe, adjudged upon
 demurrer.]

See tit. Bail.

(C) pl. 2.

S. C. the

notes there.

[7. But, otherwise it had been if he had died before a capias re-
 turned or filed. Trin. 5. Jac. B. R. agreed per Curiam Mich.
 2 Car. between Calf and others plaintiffs, and Davies defendant,
 adjudged upon demurrer, in as much as it was not averred by the
 plaintiff in the scire facias against the bail, that there was a capias
 returned against the principal before his death, which ought to
 come in of his part, and then was cited by justice Jones, 43 Eliz.
 B. R. between Hobbes and Doncaster, adjudged, that the death of
 the principal before the return of the capias discharges the bail.]

If a condi-
 tion be pos-
 sible at the
 time of the
 making it,
 as to intress

J. S. and afterwards it becomes impossible by the act of God, or of J. S. As if J. S. dies or enters
 into religion by the day, the obligation is saved by the condition. Br. Obligations pl. 45. cites 2 E. 4. 2.
 by the justices. — Co. Litt. 206. 2.

[8. If a man covenants to do a certain thing, before a certain
 time, though it becomes impossible by the act of God, this shall
 not excuse him, in as much as he hath bound himself precisely to
 do it.]

[9. If a man, for a certain consideration given by A. assumes
 to deliver to A. certain goods in London; though he after puts the
 goods into a boat to carry to London accordingly, and in going the
 boat is overturned by the violence of the tempest and water; yet this
 shall

shall not excuse him in an action upon the case upon this promise. Tr. 32 El. B. R. between Tomfon and Miles, per Curiam.]

[10. If a man covenants to build an house before such a day, and after the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant, for the not doing thereof before the day, for the law will not compel a man to venture his life for it, but he may do it after. H. 8. Jac. B. R. between Lawrence and Twentiman, per Curiam.]

[11. If the condition consists of two parts in the disjunctive, in Cro. R. 398. which the party hath an election which of them to perform, and both possible at the time of the making the condition, and one becomes impossible afterwards by the act of God. This shall excuse the performance of that and the other also, for otherwise his election should be taken away by the act of God. Co. 5. Laughton 22.]

wife's lands; if then during her life he purchased other lands of as good title and annual value to his wife, and her heirs; or do, or shall leave her by his last will, so much in value, by making her executrix, or in a legacy, that then, &c. R. alien'd the land. The wife died, leaving R. who neither in her life time, or since her death purchased other lands; all the justices resolved that the obligation was not forfeited; for the condition is express, that R. perform it at any time during his life, and the impossibility thereof, being by the act of God, shall not turn the obligor to any prejudice. So as now being prevented of part of the time, he is discharged from performing it. But when the law appoints a man time to do a thing during his life he ought at his peril to perform it, or otherwise his obligation is forfeited. And when one has election to do one thing or another before a certain time, and by the act of God it is become impossible to perform the one, the law will privilege him from the other, that he shall not forfeit his obligation by the non-performance thereof. But Gawdy conceived that the obligation was not forfeited, but that R. ought during his life to purchase lands to his wife's heir, or otherwise the obligation will be forfeited; but the other justices were e contra in that point; and judgment for the defendant.—Mo. 357. pl. 484. Eaton's case. S. C. adjudg'd for the defendant; because the condition of the obligation, was for the benefit of the obligor, to give him election to purchase other land, or to leave money, or goods; which election he is prevented of by the death of his wife, which is the act of God, and so in law a discharge of part of the condition, and then the whole condition, and obligation is discharged.—Poph. 98. S. C. but is only stated there.—S. C. cited Palm. 515, 516. Arg.—S. C. cited Arg. Mod. 265.—S. C. cited 2 Jo. 96. per Cur.—3 Mod. 233. Arg. cites S. C. and says it was insisted that the whole intent of the condition was to provide a security for the wife, so that the dying before R. the non-performance could hurt no body, there being no manner of necessity that any thing should be done in order to it after her decease.—1 Salk. 170. pl. 2. the ground of Laughter's case was denied to be universal.—S. C. cited by Powell, J. Lutw. 694. Trin. 9 W. 3. and said, that Laughter's case is good law, but the reason thereof given in 5 Rep. has been denied. And Treby, Ch. J. said that Dolben, J. had informed him, that the reason of Laughter's case had been denied in a case when feint John was Ch. J. of C. B. and that 2 of the judges in that case, had spoke with 2 of the judges in Laughter's case, who affirmed to them that no such reason was given for the resolution in Laughter's case.—1 d. Raym. Rep. 280. Treby, Ch. J. cited the affirmation of feint John as to Laughter's case, yet the whole court held that the principal case of Laughter was good law.—

[12. [But] if a condition consists of two parts, of which one was not possible at the making of the condition to be performed, he ought to perform the other. † 21 E. 3. 30. Co. 5. Laughton 22.]

And the performing the part which is possible is sufficient; per Popham and Clinch. Cro. E. 780. in pl. 14. Mich. 42 Eliz. B. R.—

[13. As if the condition be to infeoff I. S. or his heirs, when he comes to such place, he is bound to infeoff J. S. when he comes, because the other is not possible, for he cannot have an heir during his life, and so he had not any election. * 21 E. 3. 30. Co. 5. Laughton 22.]

—5 Rep. 112. a. S. C. cited per Curiam.

[14. If

* [230]

† Br. Conditions, pl. 47. cites 21 E. 3. 30. S. C.—

—5 Rep. 112. a. S. C. cited per Curiam.

—5 Rep. 112. a. S. C. cited per Curiam.

—5 Rep. 112. a. S. C. cited per Curiam.

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—5 Rep. 112. a. S. C. cited per Curiam.

—5 Rep. 112. a. S. C. cited per Curiam.

—5 Rep. 112. a. S. C. cited per Curiam.

Brownl. 72. [14. If a condition of an obligation be *to make an assurance of*
73. S. C. *certain lands to the obligee and his heirs, and after the obligee dies,*
adjudged for *yet he ought to make the assurance to his heirs; for this copulative,*
the plaintiff. *and his heirs, shall have the signification of a disjunctive.* Trin.
 40 El. B. between *Horn and May*, adjudged.]

[15. If the condition of an obligation be *to enfeoff two before*
Fol. 451. *such a day, and one dies before the day, yet he ought to enfeoff the*
Brownl. 72. *other.* Trin. 40. El. B. in the said case of *Horn and May*, ad-
73. S. C. *judged.]*
but S. P.

does not appear.—Br. Conditions, pl. 127. cites 24 H. 7. 3. per Jay, that in such case he * may
 enfeoff the other. * [All the editions of Brooke are (may) but the year-book is (shall)
 enfeoff.]—Bendl. 35. pl. 56. Pasch. 4 E. 6. S. P. held e contra by Mountague Ch. J. or C. B.
 and he said that this was Weston Browne's case, but cites Litt. Tit. Estates, that otherwise it is of
 seoffment upon condition.

Jo. 271. pl. [16. If the condition of an obligation be, that whereas a mar-
6. Wood v. *riage is intended between A. and B. if the said marriage takes ef-*
Bates. S. C. *fect, and if B. the wife survives A. and does not receive 300 l. of A.*
resolved una- *by his will, or, by the custom of London, within three months after*
vece, that *the death of A. that then if the obligor pays to B. or her executors*
the plaintiff **500 l. within six months after, the obligation shall be void.* And
shall be *after the marriage takes effect, and B. survives A. and dies within*
barr'd; for *three months, without receiving any thing of the said 300 l. by the*
the condi- *will of A. or by the custom of London; it seems the death of B.*
tion is in the *within the three months shall not excuse the obligor to pay the 500 l.*
disjunctive, *to the executors of B. because it is not any disjunctive condition, of*
or upon a *which the obligor hath any election to do the one or the other.*
contingen- *But the condition is, that if a stranger does not pay so much within*
cy, viz. that *a time, that he himself will pay another sum; so that the death of*
If the mar- *the party who is to receive from the stranger shall not excuse the*
riage takes *obligor.* Trin. 3. Car. between *Wood and . . .*]
effect, and
the said B.
does not re-
ceive 300 l.
within 2
years after

his death, either by his will, or by the custom of London, and the said B. dying within the said 2
 years, making it become impossible by the act of God, that this part should be perform'd, therefore
 the obligor is not bound to perform the other part.—Palm. 513. S. C. and at first 3 justices were
 of opinion for the plaintiff. But after further argument, the whole court was against the plaintiff, be-
 cause the performance is prevented by the act of God; for the feme ought to receive so much, and not
 to have so much left her by the baron (n'y); and the court said that a difference taken by Noy (of
 counsel for the plaintiff) is not law, viz. that where it is in election of the stranger, that there,
 though part becomes impossible by the act of God, the condition is not discharged; for it is discharg-
 ed by the common case of bail who enter into recognizance to pay, or that the principal shall render
 himself, in such case if the principal dies the recognizance is † [not] forfeited. Noy answered that
 here it might be impossible, upon the death of the baron, as to both parts; because the baron has
 left nothing by his will, and perchance there is nothing left for the feme to take by the custom, and
 consequently the obligation forfeited immediately. But per Cur. this does not appear the one way or
 the other, and so is out of the case; whereupon judgment for the defendant nisi, &c.
 † It seems the word [not] is omitted by the error of the prets.

* [231]

This case is 17. There is a diversity between a disability and an impossibility;
Mich. 34. as if I am bound to present J. S. before Mich. Ec. to the church of B.
E. 1. and in *and J. S. in the mean time marries, yet the condition is not dis-*
debt by the *charg'd.* Palm. 514, 515. Arg. citos Fitzh. Dette, pl. 164.
clerk on the

bond the pa-
 tron pleaded the clerk's taking a wife before the avoidance, and that so he was disabled to take the
 church; but by Hengham the patron is not to judge of this, but he ought to have presented him to
 the bishop, who ought to demand if he was convenable [capable] or not, and then the patron had been
 quit. Fitzh. Dette, pl. 164.

18. Where a man is bound for the appearance of *W. N. in Banco*, there if he dies before the day, the bond is saved. *Contra* if he be languishing in prison. Br. Conditions; pl. 150. cites 8 E. 4. 12. 13. per Littleton.

Br. Conditions, pl. 70. cites S. C. & S. P. by Littleton.

19. There is a diversity where a condition becomes impossible by the act of God, as death, and where by a 3d person [or stranger] and where by the obligor, and where by the obligee; the first and last are sufficient excuses of forfeiture; but the 2d is not; for in such case the obligor has undertaken that he can rule and govern the stranger; and in the 3d case it is his own act. See Br. Condition, pl. 127: cites 4 H. 7. 73. per Brian Ch. J.

20. Debt upon obligation; the defendant said, that it is indorsed upon condition, *that if J. S. comes to L. before such a feast, and brings two sureties with him, to be bound to the plaintiff in 40 l. that then &c. and that before the said feast J. N. died.* Judgment &c. and a good plea per tot. Cur. And as to the time before the feast it is not material, for all this time is the defendant's, for if he does it in the vigil of the feast it is sufficient. Br. Conditions, pl. 70. cites 15 H. 7. 2.

21. If I am bound by bond to *infeoff* the obligee at Mich. and I die before Mich. my executors shall not be charged with it; for the condition is become impossible by the act of God, because the land is descended to the heir. 2 Le: 155. pl. 189. 19 Eliz. B. R. per Cur. in the case of Kingwell v. Chapman.

22. In debt, the condition reciting that there were divers controversies betwixt the plaintiff and J. K. a stranger, who submitted themselves to the award of J. C. the defendant bound himself in 200 l. to the plaintiff, *that J. K. should perform the award on his part.* The arbitrator awarded, *that J. K. should pay the plaintiff 30 l. viz. 20 l. at Easter, and 10 l. at Michaelmas next.* The defendant pleaded payment of the 20 l. at Easter, and that *J. K. died before Mich.* All the justices held that the obligation was forfeited, but no judgment was given in the case, because the penalty was great for so small a duty. Cro. E. 10 pl. 6. Mich. 24 & 25 Eliz. C. B. Kingwell v. Knapman.

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2 Le. 155. pl. 189. Kingwell v. Chapman, 19 Eliz. B. R. the S. C. held accordingly, 1st. Because the sum awarded is now become a duty as if the condition of the

bond had been for the payment of it. 2dly, Because a day is appointed for the payment of it, and cites 10 H. 7. 18. 3dly, The executors cannot perform the condition.——S. C. cited per Cur. Raym. 415, 416. Mich. 32 Car. 2. B. R.

23. Husband bound himself in a bond conditioned, *that he and his wife*, upon the reasonable request of the obligee, *should levy a fine, &c.* The request was made when the wife was sick and could not travail. The court thought it not a reasonable request during her sickness; and if she is excused the baron is excused also, because in such case he and his feme cannot levy the said fine, and joint-consumance is intended by the said condition, whereupon issue was taken on the sickness. Mo. 124. pl. 270. Pasch. 25 Eliz. Anon.

24. A. covenants that B. shall make such reasonable assurances, &c. to D. and his heirs, as D. or his heirs should reasonably devise or require. D. required a fine. B. came before the justices to acknowledge.
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knowledge it, but B. was *non compos*, and the justices would not take the *conuſance*; the condition is not broken, the words being general; but if the words had been special to *acknowledge a fine* it would have been otherwise. *Lc. 304. pl. 432. Mich. 32 Eliz. C. B. Pett v. Callys.*

Cro. E. 877. pl. 9. 11 Rep. v. Bendingfeld, S. C. and the justices upon the first motion conceived the plea of the death of J. S. before the time of his being to go to the Guildhall porch to be good; because by the act of God he is depriv'd of his appearance, and so his bond saved, though he pays not the 10 l. for he had election to do the one or the other; but they would advise.

25. The condition of a bond was, that J. S. a stranger, should stand to an award, if it be made before the last day of August next, &c. and if no award should be then made, then he should come into the porch of the Guildhall in Norwich, the 7 Sept. and there stay two hours, to be arrested again at the suit of the obligee, or should pay to the obligee 10 l. in that porch on Mich. day next after. No award was made by the time, and J. S. the stranger, who was to perform these things, died [before the 7 Sept.] yet it was adjudged, that the money ought to be paid at Mich. *Mo. 357. in pl. 485. cites Mich. 34 & 35 Eliz. B. R. Crapp v. Field.*

26. Bond to pay 20 l. before the 1st of May, or marry J. S. before the 1st of August, if J. S. dies before the 1st of August, yet the bond is forfeited; per *Walmsley. Cro. E. 864. pl. 42. Mich. 43 & 44 Eliz. C. B. in case of More and Morecombe.*

27. If a condition be, that if the mortgagor or his heirs pay such a day, &c. and he dies before the day without heir, whereby the condition becomes impossible to be performed by the act of God, the estate of the mortgagee is hereby become absolute. *Co. Litt. 206. 2.*

28. A bill to be relieved against a bond of 300 l. conditioned to pay 15 l. per annum during the plaintiff's life; but the plaintiff pretended, that the said bond was for the performance of an agreement which was by the death of the plaintiff become impossible to be performed, and so the bond ought to be discharged. Decreed the plaintiff to pay the 15 l. per annum, and arrears with damages. *Chan. Rep. 149. 27 Car. 1. St. Nicholas v. Harris.*

[233] 29. In debt upon a bond conditioned to give security by a certain day as the chamberlain of London should appoint, defendant pleaded that there was no chamberlain of London at the day. Adjudged on demurrer for the defendant. *Vent. 186. Hill. 23 and 24 Car. 2. B. R. Sands v. Rudd.*

30. The condition of a bond recited, that W. was indebted to the plaintiff in 70 l. by bond, and the defendant became bound with him that he should pay the money on or before the 25th December, or that the defendant, on or before the said 25th December, should render the body of W. so as the plaintiff might declare against him in the custody of the officer next Hillary term. The defendant pleaded, that W. died before the 25th of December. The court held that there was no difference between this case and that of *Laughter v. Monox*, 5. Rep. 21, and gave judgment for the defendant, quod querens nil capiat &c. 2 Jo. 95, 96. *Mich. 29 Car. 2. B. R. Warner v. White.*

3 Keb. 738. pl. 34. Hill. 28 & 29 Car. 2. B. R. the S. C. & per Cur. here is an election according to *Laughter's* case, and one part being become impossible the

Bond is saved; et adjournatur.——Ibid. 761. pl. 49 Pasch. 29 Cur. 2. B. R. the court inclined strongly that the defendant was excused by the death of W. sed adjournatur.——Ibid. 770. pl. 9. Trin. 29 Car. 2. B. R. adjudged for the defendant; nisi.——2 Mod. 201, 202. Arg. cites S. C. that states it that W. died after the 25th December, but before the term, and held that the bond was not forfeited; because the obligor had election to do the one or the other, and the performance of the one becoming impossible by the act of God, the obligation was saved.

31. Condition that A. (*a stranger*) shall pay so much such a day, or personally appear such a day at ten in the morning at B.'s house; tho' *agrotus fuit ex visitatione Dei* &c. is a good plea as to that part of the *disjunctive*, yet being in the case of a stranger the other part ought to be performed. Raym. 373. Trin. 32 Car. B. R. Topham v. Pannel.

32. Debt upon bond conditioned to give the plaintiff a true account of all money received by him &c. by the 28th day of November &c. or render his body to prison at the plaintiff's suit in any action he shall then commence against him, then &c. The defendant pleaded, that he was always ready to render an account; but farther, that the plaintiff had not commenced any action against him *ad vel ante* 28th November *præd.*, whereupon he might render himself to prison; the plaintiff replied, that 300l. was due to him &c. and that after the said 28th November (*viz.*) 12 Aprilis, he sued out an original in account; and the defendant not appearing he sued out a *capias*, whereof he gave the defendant notice and required to render himself according to the condition. Upon a demurrer judgment was given per tot. Cur. for the defendant; because he being to do the first act, has election either to give an account, or render himself on the action. Besides, the breach is not well assigned, for the defendant is not obliged to render himself on an action which shall not be sued against him 28th Nov. the word in the condition being (then commenced) and is not to be construed then, or from thenceforth; for that would be to give the plaintiff liberty to commence an action at any time during his life, and conditions are always made for the advantage of the obligor. 3 Lev. 137. Mich. 35 Car. 2. C. B. Stanley v. Fern.

33. One devised to his eldest daughter, upon condition she should marry his nephew on or before she attained the age of 21. and the nephew died young, and the daughter never refused, and indeed never was required to marry him; and after the nephew's death, she being about 17, married J. S. and it was adjudged in C. B. Gregory & affirmed in B. R. that the condition was not broken being become impossible by the act of God. 1 Salk. 170. pl. 1. Trin. 4 W. and M. in B. R. Thomas v. Howell.

4 Mod. 66. S. C. three judges were for affirming the judgment, but Gregory contra.——Vent. 301. & 319. S. C. the judgment, was

affirmed.——If there be a condition subsequent, which becomes impossible by the act of God, this causes and discharges the condition; per the master of the Rolls, Trin. 1731. and said it is a rule in law, for *lex non cogit ad impossibilia*.

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34. Condition was to make obligee a lease for life by such a day or pay 100 l. to him; obligee dies before the day, his executors shall have the 100 l. Per Treby Ch. J. and the ground of Laughter's case was denied to be universal. 1 Salk. 170. pl. 2. Mich. 9. W. 3. C. B. Anon.

S. P. by Treby Ch. J. who said that it had been resolved accordingly in

time of Seint John, Ch. J. Luth. 694. Trin. 9. W. 3. — S. P. by Powell J. *ibid* — S. P. said by Treby Ch. J. to have been adjudged accordingly, in time of Seint John Ch. J. *Ld. Raym. Rep.* 979, 280. and the reporter adds a note, that this case seems to be undistinguishable in reason from Laughter's case.

But see pl. 34. *supra*, an exception to this rule. 35. Where a condition is in the *disjunctive*, if one part becomes impossible by the act of God the obligor is discharged from performance of the other part. Arg. 10. Mod. 268. Mich. 1 Geo. 1. B. R.

(H. c) [What will excuse the Performance.] Acts of the Law.

[1. IF an annuity be granted upon condition, *that the grantee shall be attorney of the grantor in all pleas; if he be after made sheriff*, yet this shall not excuse him from the performance of the condition, but he ought to be his attorney, otherwise the condition shall be broke. 5 Ed. 2. Annuity 44.]

Cro. J. 374. pl. 5. S. C. adjudged. — Roll. Rep. 136. pl. 18. S. C. the court seem'd to incline that the condition was not broken. —

Ibid. 108. pl. 1. S. C. adjudged per tot. Cur. for the plaintiff; but Crooke J. took a diversity between a collateral condition, and a condition which limits it to be paid out of the profits of the land; for had it been collateral it must have been paid notwithstanding the wardship. — 3 Bull. 58. S. C. Crooke J. said the difference will be between this case and a sum in gross, which is certain. — Hard. 16. cites S. C.

3. If the lease was upon condition the land recovered in value shall be discharged of the condition. Br. Rents, pl. 12. cites it as said elsewhere.

Fitzh. Dette. pl. 75. cites S. C. 4. Note, when a man is taken by *capias returnable Octab.* Trin. and is bound to the sheriff in 40 l. to appear at the same day to save him harmless, and this term at the day, and all the returns in it are adjourned to 15 Mich. there his appearance shall not be recorded Octab. Trin. but at 15 Mich. and this shall save his bond and discharge him; for no appearance, esoin nor default, nor other thing, shall be entred at the term adjourned; for no roll is made of it, but only of the writ of adjournment, and all things which should be done at these days adjourned, shall be done at the day to which the term is adjourned; and this shall serve for all. Br. Conditions, pl. 142, cites 4 E. 4. 21.

(I. c) What

(I. c) [What shall excuse the Performance.]
Acts of God.

[1. *Regularly, if a condition which was possible becomes impossible by the act of God, the obligation is discharged.* See (G. c) pl. 1. S. P.

[2. *As if a man hath liberty to perform a condition till a certain day, if it after becomes impossible by the death of any person before the day, the obligation is saved.* Dubitatur 14 E. 4. 3.] S. P. by Choke accordingly, but Littleton e contra

but both agree, that if the obligee had died before the day the bond had been saved. Br. Conditions, pl. 155. cites S. C. — If a man be bound to appear next term in such a court, and before the day the conusor or obligor dieth, the recognisance or obligation is saved. Co. Litt. 206. a.

[3. *If a man be let to mainprise, it is a good plea at the day when the mancapors ought to have the body &c. that he was dead before the day* (for this excuses the performance,) 21 E. 4. 70. b. Curia.] See (G. c) pl. 2. S. G.

[4. *If the condition be to infeoff J. S. within a certain time, if J. S. dies before the time be passed, the obligation is discharged.* 8 H. 4. 14.] Br. Conditions, pl. 243. cites 10 H. 7. 18. S. P.

[5. *If two be infeoffed to re-infeoff, and one dies, the survivor ought to perform it, and may.* * 41 E. 3. 17. b, Co. 2. Cromwell 79.] * Br. Conditions, pl. 20. cites S. C.

[6. *But if feoffee to reinfeoff dies before the feoffment, the condition is broke, for he is to perform it, and ought to do it during his life.* Co. 2. Cromwell 79.]

[7. *But if the condition had been that the feoffee, or his heirs, should re-infeoff, and he dies, his heir may perform it.* Co. 2. 79.] Co. Litt. 219. a. S. P. — Mo. 106. pl. 249. S. P.

agreed. — Ibid. 472. pl. 679. S. P. agreed. — 2 And. 73. S. P.

8. *If a man mortgages his land to W. N. upon condition that if the mortgagor and J. S. repay 100 l. by such a day that he shall re-enter, and he dies before the day, but J. S. pays by the day; the condition is performed, and this by reason of the death of the mortgagor; notwithstanding the payment was in the copulative, and e contra if it was not in the case of death.* Br. Conditions, pl. 190. cites 30 H. 8.

9. *Where one was bound to keep and maintain the sea-walls from overflowing, if this happen by his negligence it shall be waste, otherwise if it so happen by the act of God suddenly and so unavoidable; per Coke.* 2 Bulst. 280, in case of Bird v. Aftcock, cites Dal. 6. Eliz. * Dal. 64. pl. 26. Anon. S. C. — Mo. 62. pl. 173. S. C. — S. C. cited 19 Rep. 140. a.

10. *The condition of an obligation was, that if J. S. prove not a suggestion of a bill depending in such a court, before utas Hilarii, then if the said J. S. his executors or assigns, pay 20 l. &c.* The court seemed of opinion prima facie, that it is a good plea in bar, that J. S. died before the utas at such a place. D. 262. a. pl. 30. 514. Mich. 9 Eliz. Arundel v. Combe. S. C. cited Mo. 432. in pl. 607. — S. C. cited Arg. Palud.

Condition.

11. When the law prescribes a *means to perfect* or settle any right or estate, if by the act of God this means in any circumstance become impossible, yet no party that was to receive benefit, if the means had been with all circumstances executed, shall receive any prejudice by the not executing it in such circumstance as becomes impossible by the act of God, if *all else be performed* without laches, which the party can do. Arg. 1 Rep. 97. b. Trin. 23 Eliz. B. R. in Shelly's case.

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12. *Promise to carry* certain apples from Greenwich to London for the plaintiff, and the apples being in the boat, the boat by a great and violent tempest sunk in the Thames, so as the apples perished; this was held no plea in discharge of the assumpsit, by which the defendant had subjected himself to all adventures. 4 Le. 31. Trin. 26 Eliz. B. R. Taylor's case.

13. If a *whole house falls by sudden wind* it excuses the waste, and the tenant is not bound to rebuild it. Co. Litt. 53. a.

14. There is a diversity between a condition *annexed to estate in lands*, or tenements upon a feoffment, gift in tail, and of an obligation recognizance &c. For if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the estate of the feoffee shall not be avoided. Co. Litt. 206. a.

15. As if a man make a feoffment in fee upon condition that the feoffor shall within one year go to the city of Paris about the affairs of the feoffee, and presently after the feoffor dies, so as it is impossible by the act of God that the condition should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the estate, yet there is a precedency before the re-entry, viz. the performance of the condition, and if the land should by construction of law be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed which was made for his benefit, and it appears by Littleton, that it must not be to the damage of the feoffee. Co. Litt. 206. a.

16. So it is if the feoffor shall appear in such a court the next term, and before the day the feoffor dies, the estate of the feoffee is absolute. Co. Litt. 206. a.

17. But if a man be bound by recognizance or bond, with condition that he shall appear the next term in such a court, and before the day the conusee or obligor dies, the recognizance or obligation is saved, and the reason of the diversity is this, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition; but the bond or recognizance is a thing in action and executory, whereof no advantage can be taken until there be a default in the obligor, and therefore in all cases where a condition of a bond, recognizance &c. is possible at the time of the making, and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee &c. there the obligation &c. is saved. Co. Litt. 206. a.

Bod. 153.

pl. 199.

non. S. C.

18. C. binds himself apprentice to S. for 7 years, and S. bound himself to pay C. his executors or assigns, 10 l. at the time of the

and or determination of his apprenticeship. *C. serves 6 years and then dies*; the money shall not be paid to his executor. The whole court, (asente the Ch. J.) held that the obligation was discharged, and that the money should not be paid. *Brownl. 97. Mich. 5 Jac.* *Cheyney v. Sell.* adjudged accordingly; but had the bond been to pay 10l. after the expiration of 10 years it would be otherwise.

19. When *two things* are depending upon another, there the act of God preventing one of them, both are discharged. *D. 262. a. pl.*

30. Marg. cites 8 Jac. B. R. *Skidmore's case.*

20. If lessee covenants to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he must repair it; for when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he can, notwithstanding any accident * by inevitable necessity, because he might have provided against it by his contract. *Allen, 27 Mich. 23 Car. B. R. Paradine v. Jane.* In such case he must repair in convenient time; and so of banks flung down by a sudden and outrageous flood,

but if there was any penalty to be forfeited that is excused, because it was the act of God. *D. 33. a. pl. 10, 11. Pasch. 28 & 29 H. 8. by Fitzherbert and Shelly.*

* [237]

21. The condition of the bond was, that *whereas Christopher the ancestor did affirm that he had paid 60 l. to H. L. which H. L. did deny, if Christopher by the 10th of November did not legally prove the money paid, then if he paid the money the said 10th of November the bond should be void.* The defendant pleaded, that *Christopher died before the 10th of November.* The plaintiff demurred; but the court held this was not like a disjunctive condition, though it did depend upon a condition, and the party having undertaken to make proof, it was at his peril if he did not; and though he was prevented by the act of God, yet the bond was forfeited; judgment pro quer.' *Freem. Rep. 269. pl. 297. Hill. 1679. Vinier v. Joyner.* Raym. 415, 416. Joyner v. Vinier, S. C. in error, and adjudged accordingly; for there is a difference where the condition contains a duty vested in the obligee, and where it is only a collateral act; for in the first case the executors are bound to perform it.

(K. c) [Performance excused.]
Acts of the Law.

{ Fol. 452. }

[1.] If the condition of an obligation be to deliver a certain thing to the obligee bought by him of the obligor, it is not any discharge that a stranger recovered it from him after. *Contra 21 E. 3. 12. adjudged, as is said.]*

[2. If a man be bound in a recognizance in court for the appearance of another, in a scire facias he shall not avoid this recognizance by saying, that he that ought to appear was imprisoned at the day. *22 E. 4. 27.]*

Br. Conditions, pl. 182. cites 22 E. 4. 27. S. C. & S. P. by Brian

and Choke accordingly; but Catesby and Nele J. e contra, and that it is a good plea; and they said that it is common in B. R. if it be a lawful imprisonment by the order of the law; and nota.

Br. Conditions, pl. 181. cites S. C. but S. P. does not appear there.

S. P. So where he render'd himself before the chancellor. And after the time li-

waited he was not permitted to plead on his coming in, but writ of inquiry of damages was awarded to the sheriff of L. For the ordinance in parliament so as a judgment in itself; and because of his not coming in pursuant thereto is sufficient for the awarding the writ of inquiry; quod nota. Br. Parliament, pl. 11. cites 8 H. 4. 13. & 20. — And ibid. cites 9 H. 4. 1. that the plaintiff was view'd, and upon view of the strokes, the court awarded double damages, viz. 200 marks, notwithstanding it was alleged that J. S. was dead; for he was out of court before, and cannot be wain'd to appear again. And this as it seems by the awarding the writ of inquiry of damages. — This was for beating a servant of a night as he was going with his master to the parliament. Anno 5 H. 4. Ibid.

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Br. Parliament, pl. 11. cites S. C. but S. P. does not appear there.

[5. [S.] if there be a constitution made in parliament upon a penalty that J. S. render himself before the justices in B. R. within a quarter of a year after proclamation made, if proclamation be made termino Pasche, so that the quarter of a year is passed before Michaelmas term, yet if he does not render himself within a quarter, he shall forfeit the penalty. 8 H. 4. 13. 20. adjudged. Yet he could not appear in the vacation; but some said that he might before the chief justice. (But in this case he ought in the term within the quarter, because he knows in principio, that in the vacation he cannot appear.)]

[This plea does not properly belong to this division.]

S. P. Br. Conditions, pl. 233. cites 11 H. 4. 57.

Vent. 175. S. C. Twifgen J. thought it hard that this should be a breach; for the defendant cannot be intended to covenant against an act of parliament, which was a thing out of his power. But Hale

[6. Regularly, if a condition be to be performed to a stranger and he refuses to accept thereof, yet the obligation is forfeited, because the obligor takes upon him that a stranger shall accept it.]

7. A man is bound by mainprise in bank to answer to W. N. in such action such a day, and does not come all the day, but protection is cast for him, this shall save the mainprise and the bond, per Cur. Br. Conditions, pl. 231. cites 11 H. 4. 57.

8. A. sold lands to B. in fee, and covenanted for quiet enjoyment against him and J. S. and their heirs, and all claiming under them. B. assigns a breach, that C. claiming under J. S. ejected him. A. the defendant pleaded that at the time of the covenant he had an indefeasible title by certain fines from P. and his wife (on whom J. S. had settled the same) but by an act of parliament afterwards made, reciting that such fines were unduly procured of her, enacted that they should be void, and that C. claimed under the wife of P. and enter'd by reason of the said act, and ousted him. Upon demurrer, it was insisted that the title being good at the time of the covenant made, and that the title upon which the ouster is, being by act of parliament made afterwards, cannot be any breach, and cited lady Gresham's case, 9 Rep. 106, 107. But it was answer'd and resolved by Hale and Rainsford, that this act makes no new title, but

but removes an obstruction of the old one; and they said that doubtless B. was named in the covenant for this purpose, in case this fine unduly obtain'd should be set aside. *But* Twissden being of a contrary opinion, a writ of error was brought immediately. But the reporter (who was counsel for the defendant) says he knows not what became of it, 2 Lev. 26, 27. Mich. 23 Car. 2. B. R. *Lucy v. Levington.*

lady Gresham's case is not like this, for there the party was in by the queen's consent to the

alienation by the act she passed, but here the covenant is broken, as much as if a man recovers land and then sells and covenants thus, and then it be evicted in a writ of right, for this is in the nature of a judgment. Though it be by the legislative power, it may be the prospect of this act was the reason of the covenant; nor has the defendant reason to complain, for the act was made because of his own fraud and force; every man is so far party to a private act of parliament as not to gainsay it, but not so as to give up his interest. It is the great question in *Barrington's case*, 8 Co. the matter of the act there directs it to be between the forfeiters and the proprietors of the soil, and therefore it shall not extend to the commoners to take away their common. Suppose an act says, Whereas there is a controversy concerning land between A. and B. it is enacted that A. shall enjoy it. This does not bind others, tho' there be no saving, because it was only intended to end the difference between them two. Whereupon judgment was given for the plaintiff.——The case was, Sir Thomas Gresham convey'd lands to certain uses, with power of revocation, and then he revoked, and alien'd, and died; but the revocation being not pursuant to his power, it was afterwards made good by act of parliament, and then process went out against his widow for a fine, the lands alien'd being held in capite, but she was discharged because the alienation took effect by an act of parliament, which can do no wrong. Arg. Vent. 176. cites 9 Rep. 106. *lady Gresham's case.*——9 Rep. 106. b. 107. a. S. C. cited by the chief justice as adjudg'd Trin. 31 Elis. in the Exchequer. The queen v. *lady Gresham.*

(L. c) [Performance excused. How.]

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Acts of a Stranger.

[And who shall be such a Stranger.]

[1. *A. and B. submit themselves to the award of C. and A. enters into an obligation to C. to stand to the award, and so does B. also, and C. awards A. to pay 10s. to B. who tenders it, and B. refuses; the obligor is excused because * B. is not a meer stranger, but privy, and so is the obligee.* 22 E. 4. 25. b. Curia.]

* B. is not a stranger to the obligation, because he is named in the condition thereof.

Br. Conditions, pl. 182. cites S. C.——Br. Arbitrement, pl. 41. cites S. C.

[2. *But if the condition be, that the son of the obligor shall marry the daughter of the obligee, if the daughter of the obligee refuses the son, yet the condition is forfeited; for the daughter is a meer stranger, and the obligor hath taken upon him that his son shall marry her.* 22 E. 4. 26. b. Perkins 756.]

Br. Conditions, pl. 182. cites 22 E. 4. 25. S. C. but I do not observe S. P. there.

[3. *So if the condition be to infeoff a stranger, who refuses, yet the obligation is forfeited.* * 2 E. 4. 2. 39 H. 6. 10. b. † 22 E. 4. 26. b.]

* Fitzh. Barre, pl. 82. cites S. C.——

Le. 195. S. C. cited per curiam——S. P. and so of condition to pay money to a stranger; for the obligor, &c. took it upon himself to do it. Br. Conditions, pl. 136. cites 9 H. 7. 17. But Brooke says quære; for it was not adjudg'd.——3 Bull. 30. Coke Ch. J. held that if a man be bound that J. S. a stranger shall infeoff the obligee, and he refuse to take it, he shall take now no advantage of this; but if the condition was to infeoff a stranger who refuses to take it, this is a forfeiture, because he has taken upon him to do it; but the other, to whom it is to be done, has neither jus in re nor ad rem, and this is very clear; and if a day be limited, as if a man be bound that another shall pay so much to J. S. at Mich. next, and he dies before, this ought now to be paid to his executors.

† Br. Conditions, pl. 182. cites 22 E. 4. 25. S. C. but I do not observe S. P. there.

[4. [So]

Fitzh. En- [4. [So] if there be a *feoffment upon condition to infeoff a stranger*
 tre conge- if the stranger refuses, yet the condition is broke, because the intent
 able, pl. 2. *was not that the feoffee should retain it.* 19 H. 6. 34. b.]
 cites S. C.

—S. C.
 cited per Cur. Le. 199. —Co. Litt. 209. a. takes a *diversity* between a condition to *infeoff the ob-*
ligee or a mere stranger [to his own use] and where it is to infeoff a stranger for the benefit or behoof
of the obligee, and that in the last case a tender and refusal shall save the bond, because he himself up-
 on the matter is the cause why the condition could not be performed, and therefore shall not give him-
 self cause of action. But if A. be bound to B. with condition that C. shall infeoff D. in this case if
 C. tender, and D. refuses the obligation is saved, for the obligor himself undertaketh to do no act,
 but that a stranger shall infeoff a stranger. And it is holden in our books, that in this case it shall be
 intended that the feoffment should be made for the benefit of the obligee. Some to reconcile the books
 seem to make a difference between an express refusal of the stranger, and a readiness of the obligor at
 the day and place to make performance, and the absence of the stranger, but that can make no dif-
 ference. I take it rather to be the error of the reporter, and the records themselves are necessary to be
 seen, for the law therein is as hath been before declared.

See pl. 3. [5. But *otherwise* it had been, if the condition was *to make a*
 and the *gift in tail to a stranger*, and he refuses; for there the *intent was,*
 notes there. *that he should have the reversion.* 2 E. 4.]
 —Le. 199.

S. P. per
 Cur. obiter, and cites 2 E. 4. 2 & 19 H. 6. 34. —2 Le. 222. in pl. 281. S. P. by Dyer. —Co.
 Litt. 209. a, S. P.

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 Where the [6. *Regularly, if the condition be to be performed by a stranger,*
 covenant or *and he refuses, the obligation is forfeited; for the obligor has taken*
 condition is, *upon him that the stranger shall do it.]*
that the one

shall marry
a stranger, or shall infeoff him by such a day, the refusal of the stranger is no plea, for the party has
taken upon him to do the thing. Br. Conditions, pl. 13. cites 33 H. 6. 16. — *Contra* if the act
 shall be done to the other party, for there the refusal is a good plea. Note a *diversity*, and therefore
 it is usual in such cases of strangers to add such words, and if the said stranger will consent to it. *Ibid.*
 —Br. Covenants, pl. 3. cites S. C. —Fitzh. Barre, pl. 62. cites S. C. —3 Bullt. 29, 30.
 Arg. S. P. cites 37 H. 6. 16, 17. Sir John Burre's case [but seems misprinted for 33 H. 6. 16.]

[7. *As if the condition be that my son shall serve J. If he will*
 * Fol. 453. *not, my obligation is forfeited.* 22 E. 4. 26. b.]

Br. Conditions, pl. 182. cites S. C. but I do not observe S. P. there.

2 Le. 114. [8. If the condition of an obligation be, that *whereas the obligor*
 114. pl. 153. *and obligee are jointly seised of the office of the court of admiralty, if*
 Pasch. 28 the obligor shall *permit the obligee to use the said office, and to take*
 Ellis. Parker *the profits thereof only to his own use during his life without inter-*
 v. Harrold, *ruption made by the obligor, then &c.* Although after the admiral
 S. C. tho' the obligor dies, and the new admiral grants the said office to a stranger (as he
 has a new may by law) and he interrupts and ousts the obligee, yet if the
 title derived obligor after this interrupts the obligee also, the condition is broke.
 from the M. 32, 33 El. B. R. between Parker and Hardward, adjudged.]
 new admiral, and the
 former title of the plaintiff is determin'd, yet against his own bond and deed he shall not put out the plaintiff, &c.
 And the court was clear of opinion that judgment should be given for the plaintiff; but the cause was
 compounded by order of the lord chancellor. —3 Le. 142. pl. 191. Parker v. Howard, S. C. in
 totidem verbis. —Godb. 47. pl. 19. S. C. And Clench J. said, that if the plaintiff occupies the of-
 fice by right or by wrong, the defendant is not to interrupt him against his own bond.

9. If a man is bound to me to carry a sum of money, and is robbed
 thereof in his journey, he is not excused of his bond. Per Cheer.
 arguendo

arguendo in covenant; but per Kirton, he certainly shall be. Br. Obligation, pl. 9. cites 40 E. 3. 6.

10. Feoffment upon condition *to infeoff the feoffor*; if day be limited there *he need not request*; for if he does not infeoff him by the day, the other may re-enter without request. Br. Conditions, pl. 26. cites 44 E. 3. 8.

11. If *A. is bound to B. that I. S. shall make him a house by such a day, or else to pay him 20 l. by such a day*. It is no plea for him to say that *I. S. was dead before the day*, for that another might have made it, per Coke, Ch. J. 3 Bullst. 30. cites 31 H. 6. Fitzh. Tit. Bar. pl. 59. and says that to this purpose is 15 H. 7. fol. 13.

12. If a man be bound *to appear here at Westminster such a day before the justices*, and at the day *no justice is there*, he shall not forfeit his bond; per Littleton. Quod nullus negavit. Br. Conditions, pl. 140. cites 2 E. 4. 2.

13. Debt upon obligation, the defendant said that it is indorsed, that *if the defendant or any for him goes to Bristol such a day, and there shews to the plaintiff, or his counsel, sufficient discharge of annuity of 40 s. per ann. which the plaintiff claimed out of 2 mesuages in D. that then &c.* and said that A. and B. by assignment of the defendant came the same day to B. and *tender'd to shew to N. and W. the plaintiff's counsel, a sufficient discharge of the annuity, and they refused to see it*, judgment *fi actio*, and the plaintiff demurred, and it was awarded no plea by all the justices after great argument, because he *did not shew what discharge he tender'd*, as a [241] *release or unity of possession, &c.* For this lies in the judgment of the court to adjudge it; but if they had said that he did not come there at the day, this shall be tried per Pais, Br. Conditions, pl. 183. cites 22 E. 4. 40.

14. In debt, A. was bound to B. by obligation in 100 l. upon condition that *if the said A. after the death of his father, and within 3 months after made sufficient estate in such land to a feme*, that then, &c. The defendant said, that the same feme took the obligor to baron in the life of the father, which espousals continued 3 months after the death of the father, so that he cannot infeoff him. Per Townsend J. the obligation is forfeited; for when he is bound to assure it to a stranger, as here, he ought to do it at his peril; for in this he took upon him to rule the stranger. Br. Conditions, pl. 127. cites 4 H. 7. 3.

15. And if the feme in this case had entered into religion, the obligation had been forfeited. Ibid.

16. But if the obligee himself be the cause that the obligation be not performed; this is no forfeiture, for this is his own act. Ibid.

17. Debt upon obligation, the condition was *to pay the plaintiff, or his assigns 20 l. at such a day and place*, that then, &c. The defendant pleaded that the plaintiff appointed one A. to receive the money of him at the day and place, and that he tender'd the same to the said A. who refused it. The plea was held good, without alleging payment in fact. Mo. 37. pl. 120. Trin. 4 Eliz. Anon.

18. But otherwise it is when the condition is *to pay the money to a stranger*, for that the payment ought to be at the peril of the obligor, Mo. 37. pl. 120, Trin. 4 Eliz. Anon.

Dal. 38. pl. 9. S. C. in totidem verbis.

Dal. 38. pl. 9. S. C. in totidem verbis.

19. Covenant. *Lessee for years covenanted at the end of the term to yield up the tenements well repaired; it was assigned for breach, that he had not left, &c. The defendant said that one B. was seised, until by the plaintiff disseised, who leased to the defendant, and after B. entered and enfeoffed J. S. who yet is seised, &c. and adjudged a good bar.* Cro. E. 656. pl. 21. Hill. 41 Eliz. B. R. *Andrews v. Needham*, being gone, the obligation is discharged.

20. In debt on obligation, condition'd to make such a release, in Mich. term next, as the judge of the prerogative should think meet; the defendant said that I. S. was judge there at the time, and that he did not appoint or devise any release; adjudged no plea, because not alleged that he caused a release to be drawn and tender'd to the judge, for he to get such a release drawn as the judge shall allow of. Cro. E. 716. pl. 41. Mich. 41 and 42 Eliz. C. B. *Lamb v. Brown*, went. S. C. cited Mo. 645. in pl. 892.—S. C. cited Cro. 2. 864. in pl. 42.

21. Audita querela, that he was obliged in a statute of 600 l. to the defendant, to the use of I. B. defeasanced, that if he paid such sums, at such days, to J. B. it should be void; and shewed that at every of the said days and places he was paratus to pay the said sum, and obtulit them; all the court held, that the tender was a sufficient performance, the defeasance being made to the use of J. B. but if he had been a meer stranger, and was not to have any benefit thereof, it would be otherwise, and judgment for the plaintiff. Cro. E. 754. pl. 18. Pasch. 42 Eliz. C. B. *Huff v. Phillips*. S. C. and judgment affirmed by all the justices.

22. In debt upon bond, conditioned to deliver to the plaintiff, all the tackle of such a ship under the hands of 4 persons, or in default thereof, to pay to the plaintiff so much money, &c. as the 4 persons should value the tackle to be worth; the defendant pleaded, that the 4 persons had not valued the tackle; and upon a demurrer to this plea the plaintiff had judgment, for where the defendant has election by the condition to do one of 2 things, if by any default of a stranger, or of himself, or of the obligee, or by the act of God he cannot do one of them, there he ought to do the other; and the defendant in the principal case ought to have got the 4 persons to value the tackle. Mo. 645. pl. 892. Pasch. 43 Eliz. *Moore v. Morecombe*. S. C. cited Arg. Mod. 265. says the resolution of that case is law, and that there needed no such rule, and that it goes upon the reason of Lamb's case, 5 Rep. [23. b.]

* [242]

23. If A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this; per Coke Ch. J. 3 Bulst. 30. Pasch. 13 Jac.

(M. c) What

(M. c) *What Things will dispence with a Condition.
Acts of him that will have the advantage.*

[1. *If a condition be to recover certain land against J. S. and thereof to enfeof another, who is party to the obligations, if he to whom the feoffment is to be made, accepts a feoffment of the land before any recovery had by the other, the condition is performed (it seems, because he had dispensed with the condition.)* 39 E. 3. 3. 5. 6 b. But quere, for perhaps he hath disseised J. S. but it is there said, that it shall be intended that he himself was seised thereof.]

[2. If a lease for years be made upon condition *not to alien without licence*, and after the lessor *licenseth* the lessee to alien, and dies before alienation, yet the lessee may alien; for the death of the lessor is not any countermand; for this was executed on the part of the lessor as much as it could be. Co. Lit. 52. b. cites M. 3 Jac. b. to be resolved.]

* In Roll. it is misprinted (Lessee.) Cro. J. 102. pl. 36. Mich. 3 Jac. B. R. Walker v. Bellamie,

seems to be S. C. only here it is said to be that the lessor died before the alienation, whereas in Cro. it is stated that the alienation was after a grant of the reversion by the lessor, and attornment by the lessee; and held that though the alienation was after the grant of the reversion by the licence of the grantor, yet it was good enough, and judgment accordingly.

3. If a man be bound to present J. N. to the church of D. and J. N. takes feme, and the church voids, yet the obligor ought to present J. N. for otherwise he shall forfeit his obligation; the reason seems to be, in as much as it is a condition in fact, as to stand to a void award &c. Br. Conditions, pl. 189. cites 34 E. 1. and Fitzh. Debt 164.

4. Annuity was brought by a man, to whom it was granted till he was promoted to a competent benefice. The defendant said, that the plaintiff had taken feme, and so could not receive a benefice, and a good plea by award. Br. Annuity, pl. 16. cites 7 H. 4. 16.

Br. Tout Temps Priest. pl. 18. cites S. C.

5. If a man is bound in an obligation of 40 l. upon condition or defeasance that if J. S. be servant to the obligee for 7 years, that the obligation shall be void; per Cur. it is a good plea that the obligee licenced the servant to go, &c. though the licence be only by parol. Br. Licences, pl. 18, cites 6 E. 4. 2.

6. Where a man leases land, rendering rent, and the tenant is bound to pay it, and the obligee enters into part of the land, the obligation is determined; for this is an advantage of the obligee. Br. [243] Conditions, pl. 128. cites 4 H. 7. 6.

7. A. leased a house and lands for 21 years to B. reserving rent annually, provided that the said B. &c. should not parcel out from the said mesuage any lands without A's consent. B. leases parcel of the land to C. for part of the term. The rent became arrear, and A. accepted the same, and afterwards entered for breach of the condition. Two judges held that the entry was gone, but the other (there being only one more in court) was of a contrary opinion. 2 And. 42. pl. 28. Hill. 38 Eliz. March v. Curtis.

2 And. 90. pl. 54. S. C. 3 judges held, that this acceptance shall not conclude A. but that he may enter and avoid

the lease; for it might be that the lessee had first conveyed the parts, and so broken the condition, and yet A. might not have any notice thereof, and then it would be hard to conclude him in such case; for if it should, then every one in such case may be defrauded of the benefit of his condition.

—Cro. E. 528. pl. 57. S. C. Anderson and Beaumont held, that the entry was barr'd by the acceptance, but Walmfley e contra, Owen absente; adjournatur. —Mo. 425. pl. 594. S. C. according to Cro. E. supra. —Brownl. 78. S. C. but S. P. does not appear. —3 Rep. 65. a. S. C. cited by the reporter, and says, that it was adjudged by Anderson, Walmfley, and the whole court, that though the lessor accepted the rent by the hands of the lessee, yet inasmuch as the lessor had no notice of the assignment, the acceptance did not conclude him of his entry.

8. The plaintiff had *entred into articles* to purchase land, but objections being made to the title they were removed, after which he paid a considerable part of the money, and *came into several orders of court with the defendant, to pay the residue* by such a day, and *in default thereof to give up the articles, and lose what he had before paid*. The plaintiff made further default, and prayed to be relieved on payment of principal and interest. Lord chancellor said, that *the agreements* being looked upon to be *intended only as a security* for payment of the money, if the defendant had his principal, interest, and costs, he could not complain; that at the time when the money was to have been paid, being in 1720. Money was locked up; that a delay happened by the death of defendant's father, and his executors not acting, and the defendant's delaying to administer to his father with the will annexed, which was the *default of the party, so that the plaintiff's payment at the exact time was dispensed with*, and therefore decreed the plaintiff to be relieved upon payment of principal, interest, and costs. Trin. 1722. 2 Wms's Rep. 66. Vernon v. Stephens.

(N. c) What Act or Thing will excuse the Performance of the Condition.

Acts of him who is to have the Advantage.

* This should be 92. a. in principio, per Cur. Obiter; for the obligee had no colour to enter upon the obligor. —S. P. Arg. Godb. 75. in pl. 90 —See pl. 9. S. C.

[1.] If a condition be *to infeoff the obligee*, though the *obligee disfeises him* of the land, yet this does not excuse the performance of the condition, for *he may re-enter*, and perform it notwithstanding. Co. 8. Francis * 32. Co. 2. Julius Win. [Winnington's case.] 59. b. admitted.]

If a man makes a feoffment in fee, upon condition that the feoffee shall re-infeoff him at such a day, and before the day the feoffor disfeises the feoffee, and holds him out by force until the day be past, the state of the feoffee is absolute, for the feoffor is the cause, wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. Co. Litt. 206. b.

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Cro. E. 374. pl. 22. Carrel v. Read, S. C. adjudged no plea, unless he had so d that the lessor

[2. If lessee for years covenants to drain the water which is upon the land before such a day, and after the lessor enters before the day, and there continues till the day is past, yet this shall not excuse the performance of the covenant, because this is collateral to the land. Hill. 37 El. B. R. per Curiam adjudged.]

for held him out, and disturbed him to do it, —Mo. 402. pl. 534. Carith v. Read, S. C. is, that a lease was made of certain tenny grounds in the county of C and the lessee covenanted to drain certain other lands in the said county not in the lease, and upon covenant brought he pleaded, that lessor had entered

enter'd into the land leased, and adjug'd no plea; because the covenant was collateral, and not for the doing a thing inherent to the land demised; but if the covenant had been, that upon the land demised he should do such an act, the entry into the land leased may excuse the act; and cites 15 H. 7. 10. 10 E. 4. 18. 19 E. 4. 2. and 35 H. 6. Fitzh. Barre, 162. — Ow. 65, 66. S. C. adjudged accordingly.

[3. If a man be bound to build an house, &c. he is excused if the obligee will not suffer him to build it; for he cannot come upon the land without his will. 19 E. 4. 2. b. per Curiam.]

Br. Covenant, pl. 31. cites 18 E. 4. 8. which is the commencement of the S. C. and says it is a good plea in covenant brought for the not building, that the plaintiff commanded him not to build it, but a discharge it cannot be, unless it be by writing, where the covenant is by writing, as in the principal case it was; per the opinion of the court.

ment of the S. C. and says it is a good plea in covenant brought for the not building, that the plaintiff commanded him not to build it, but a discharge it cannot be, unless it be by writing, where the covenant is by writing, as in the principal case it was; per the opinion of the court.

[4. If a condition be to repair a house, he is excused thereof if a stranger by the command of the obligee himself disturbs him, and will not suffer him to do it. 9 H. 6. 44. b.]

Fitzh. Doubtful Plea, pl. 39. cites S. C. & S. P. admitted by issue; and cites also Mich. 6 H. 6.

[5. If a condition be to erect a mill, and after he comes to the obligee, and says all is ready for the erecting thereof, and demands of him when (*) he shall come with the mill to erect it, if the obligee says he will not have the mill, and entirely discharges him of the mill, this shall excuse him of the performance. 3 H. 6. 37. admitted by the issue.]

* Fol. 454. See pl. 3. in the notes there.

[6. If lessee for years covenants to drain the water that stands upon the land before such a day, and after the lessor enters upon the land, and disturbs the lessee; this is a good excuse of the performance of the condition. Hill. 37 Eliz. B. R. per Curiam.]

See pl. 2. S. C. and the notes there. Godb. 70. in pl. 84.

Mich. 28 & 29 Eliz. Arg. cites a case in the same term in C. B. where lessee for 5 years covenanted to build a mill within the term, and because he had not done it, the lessor brought an action of covenant; and the defendant pleaded, that within the last three years the lessor forcibly held him out, &c. so as he could not build it; and by the opinion of all the justices, he ought to plead that the lessor with force held him out, otherwise it would be no plea.

[7. If a man covenants with me to collect my rents in such a town, if I interrupt him in the collecting thereof, this excuses the covenant. 13. H. 7. Keble 34. b.]

[8. If lessee for years of an house covenants to repair it, and to leave it in as good plight as he found it, and after certain sparks of fire come out of the chimney of the lessor into an house not much remote, by which the house of the lessee is burnt, this will excuse the performance of the covenant to the lessee, so that he is not bound to re-build, because this comes by the act of the lessor himself. Trin. 12 Jac. B.]

[9. If the condition of an obligation be, that the obligor shall in- fess the obligee of the land before such a day, and after before the day the obligee disseises the obligor, and keeps it with force till after the day, so that the obligor cannot enter, this will excuse the performance of the condition. Co. 8. Frances 92.]

a Brownl. 277. Mich. 7 Jac. Miller v. Francis, S. C. but S. P. does not appear.

* [245]

8 Rep. 92. a. per Cur. in Francis's case. — Where a person agrees to do a thing, he must shew he has done all in his power to perform it, and he ought likewise to shew how it came to pass, that it was not performed; as that the defendant was there and refused to accept, or was not there at all, or on the last convenient time of the day which the law appoints for doing the matter, and all this the plaintiff

plaintiff ought to shew to entitle himself to his action; per Holt Ch. J. 12 Mod. 532. Trin. 13 W. 3. in case of *Lancashire v. Killingworth*.

And upon this reason of law is the case in 8 Rep. 92. *Francis's case*. One makes a *seoffment*, upon condition that the *seoffee* should re-inseoff himself by such a day, and before the day the *seoffee*, or obligor, is diseoffed by him that was to be inseoffed; and then the bond is put in suit. It is not a good plea to say, that you were always ready to inseoff him, but that he himself before the day ousted you, but you must proceed farther, and say, that he kept you out of the possession till after the day with force; for though he had interrupted you, perhaps you might have come upon the land after and performed the agreement, or made a tender, which if he refused would have been tantamount; for you ought not only to shew a disturbance by him, but also such continuance of that disturbance as made it impossible for you to perform on your side, and in that case he ought to shew, that he came to endeavour to make a seoffment, but could not do it by reason of the force he met with from the plaintiff, and that had been a good excuse; per Holt Ch. J. 12 Mod. 532. Trin. 13 W. 3. in case of *Lancashire v. Killingworth*.

* Godb. 70. Arg. cites S. C. but not S. P. — Ibid. 75. cites the master of St. Catherine's case. S. C. & S. P. [10. If a lease be made upon condition that the lessee shall not permit or harbour any whore within the house to him let; and that if he suffers such women to stay there for 6 weeks after warning, &c. it shall be lawful for the lessor to enter; and after the lessee suffers such woman to be there, and warning is given him by the lessor; although after the lessor commands the woman to stay there for 6 weeks yet this shall not excuse the performance of the condition, because the lessor did not do any act; and notwithstanding the command, the lessee might have removed her. * 35 H. 6. Bar. 162. per Curiam. Co. 8. Frances 91. B.]

8 Rep. 92. a. in Francis's case cites S. C. & S. P. [11. But in the said case, if the lessor ousts the lessee; and with force, and against the will of the lessee, puts in the woman, and violently makes her stay there with force, against the will of the lessee for 6 weeks, this shall excuse the performance of the condition. 35 H. 6. Bar. 162. Co. 8. 92.]

[12. If a lessee for years covenants to leave part of the land at the end of the term fallowed and fit for wheat, provided that the lessee, upon such warning, may surrender and depart at any feast of Michaelmas at any time within the term, performing the covenants; if after warning he surrenders, and does not leave the land fallowed, he hath forfeited his covenant; for the acceptance of this surrender does not dispense with the covenant, in as much as by the covenant he is to accept thereof. Hill. 4 Jac. B. R. between *Moyle and Austion*, adjudged.]

Cro. E. 655. pl. 19. S. C. held accordingly. — Mo. 555. pl. 751. Terry and [13. If two are bound in a statute, with a defeasance, that they two shall make such assurance as shall be devised, &c. if an assurance be devised and tender'd to one, and he refuses to seal it, the condition is broke for both; for he need not request both at one time. H. 41 Eliz. B. R. *Lowe and Terry's case*.]

Terry and Lowe v. Redding, S. C. adjudg'd.

[14. Upon a marriage between A. a woman and B. by indenture between A. and B. and C. a friend of A. it is agreed, That C. shall have all the stock, portion, and estate of A. prout tunc fuit, vel potuisset esse appreciat' vel extunc postea foret invent', restaret & remaneret in manibus & usu, Anglice, employment of C. vel ubi ipse disponeret, till B. shall provide a certain jointure, &c. ipso C. * annuatim solvendo querenti interesse proinde secundum ratam 8 l. pro quolibet 100 l. pro quolibet anno durante tempore quo status ipsius A. in manibus vel dispositione C. remaneret; and after the

the marriage is had, and then 400l. of the substance of *A* comes to the hands of *C*. and for one year continues in his hands; but *B*. takes and detains in his hands of the substance of *A*. goods to the value of [246] *100l. over and above the said 400l. and this also against the will of *C*. so that *C*. hath not all the substance of *A*. in his hands; yet he shall pay according to the rate of 8l. for every 100l. of the said 400l. which he had in his hands, in as much as the words are, That he shall pay 8l. *pro quolibet* 100l. Mich. 8. Car. B. R. between *Crosse* and *Northey*, adjudged upon demurrer, I being de consilio querentis.]

15. Where a man is bound, that he shall not refuse to make such indenture, and he says that the plaintiff required him, and he was ready, and the plaintiff refused; and the other said, that at another time the defendant refused, and the other e contra, and found for the plaintiff; and alleged in arrest of judgment, because the issue should be upon the refusal of the plaintiff & non allocatur, but the plaintiff recovered; for the defendant ought not to refuse at any time; quod nota. Br. Repleader, pl. 15. cites 7 H. 6.

Br. Conditions, pl. 49. cites 7 H. 6. 24. S. C.

16. If the condition had been *to infeof* *J. S.* before such a day, and *J. S.* in the mean time enter'd into religion, the obligation was saved by the condition. Br. Obligation, pl. 45. cites 2 E. 4. 2.

17. Writ of entry of 40 s. rent out of the monastery of *S.* where variance was between the plaintiff and defendant for tithes, and the plaintiff granted to the defendant the tithes, and he granted the 40 s. rent to the plaintiff and his successors for the said tithes, and the defendant said, that the plaintiff had taken 24 loads of the tithes; judgment fi actio. And per Littleton and Brian the bar is no plea; for where the rent was granted for the tithes, all is executed, therefore the one cannot be estopped for the other; for the grant of one thing for another is no condition. Br. Conditions, pl. 61. cites 9 E. 4. 19.

Br. Conditions, pl. 61. cites M. 15. E. 4. 2. accordingly.

18. But where annuity is granted *pro consilio impendendo*, and the grantee refuses to give him counsel, this is a forfeiture of the annuity; for this is a condition in law, and the counsel is executory. Ibid.

19. So where one is bound to make a new pale of the park, and he shall have the ancient pale, there if he be disturbed of the ancient pale, he is not bound to make the new. Br. Conditions, pl. 61. cites 9 E. 4. 19.

20. So where a man grants to me 10 l. annuity to have a gorse or gutter in my land, and I stop the gutter or gorse, I shall not have the annuity; for these are things executory; and there if the one be disturbed, the other may do the like. Ibid.

21. And where a man is to have my meadow in severalty after the hay carried away, because I shall have easement to carry it over his land, if he disturbs me of the easement, I may disturb him for the meadow. But it is not adjudged. Ibid.

22. But per Littleton, where a man grants an advowson to me, and I grant to him an annuity, and I disturb him of the advowson, this is no bar of the annuity, for both are executed; for the annuity is executed by the grant. Ibid. cites M. 15 E. 4. 2.

The law is the same if he was tenant at common law, and the obligee ceases, the obligation is saved, because it was the act of the plaintiff himself; quod nota. Ibid.

23. If the obligee himself be the cause that the obligation cannot be performed, this is no forfeiture; for it is his own act. Br. Conditions, pl. 127. cites 4 H. 7. 3.

24. A man surrendered copyhold to J. S. and is bound in an obligation that J. S. shall enjoy it without interruption of any, and J. S. afterwards committed a forfeiture, and the lord entered, the obligation is not forfeited, because it was his own act. D. 30. a. pl. 205. Hill. 28 H. 8. Compton v. Brent.

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25. It is a general rule in conditions, that if the plaintiff himself be the cause of disablement, so as the condition cannot be performed, he shall not take advantage of the condition. Arg. Godb. 76. pl. 90. Mich. 28. and 29 Eliz.

3 Le. 159. pl. 206. Mich. 29 and 30 Eliz. S. C. in totidem verbis.

26. A. leased to B. at 40l. per ann. and a stranger covenanted with A. that B. should pay the 40l. for the farm and occupation of the lands; A. brought an action of covenant against the stranger, who pleaded, that before the day of payment, the plaintiff bought B. of the farm; it was objected that this was no plea, because this is a collateral sum, and not for rent issuing out of the land; but the court held the contrary, that it is a conditional covenant, and that the consideration upon which the covenant is conceived, viz. The farm and the occupation of it was taken away by the act of the plaintiff himself. 2 Le. 115. pl. 153. Trin. 32 Eliz. B. R. Bedell's case.

Brownl. 78. S. C. & S. P. by Sir Edward Coke.

27. Acceptance of rent, is a dispensation of a forfeiture for non-payment of rent, but not of a breach of a collateral condition. Cro. E. 528. pl. 57. Mich. 38 and 39 Eliz. C. B. Marth v. Curtis.

28. Debt on a bond condition'd to save harmless from a bond made to C. for payment of 100 l. at a day and place, &c. The defendant pleaded, that at the day of payment, he was going to the place to pay it; and the plaintiff by covin caused him to be imprisoned till after sun-set of the same day, to the intent the 100 l. should not be paid, and so the obligation to be forfeited; and so he could not come to the said C. to pay him the said 100 l. Adjudged upon demurrer, that such a bare surmise was no bar. Cro. E. 672. pl. 30. Pasch. 42 Eliz. C. B. Morris v. Lutterel.

S. C. cited by Holt, Ch. J. 12 Mod. 532. and calls it a very remarkable case.

29. The condition of a bond was, that before such a day, the obligor would procure such a woman to marry the obligee; the obligee goes to her, and tells her, how barbarously he would use her if she married him, and called her whore, and threatened to tie her to a post, and told her such things, that no woman in her senses would marry such a man; after the day, debt was brought upon bond, and this matter specially pleaded in bar, and adjudged to be no good plea, but that, notwithstanding the menaces, the obligor ought to have shewed, that he had done his utmost endeavour to procure her to marry him, but that she by reason of the menaces refused, and so he was hindered by the plaintiff. Cro. E. 694. pl. 4. Mich. 41 Eliz. B. R. Blandford v. Andrews.

30. A feoffment was made on condition to pay 200 l. at such a day, and to make a sufficient lease of Bl. Acre, parcel thereof, for 21 years. The 200 l. was paid, but as to Bl. Acre it was insisted that that was parcel of the land, whereof the feoffment was made, which the feoffee yet continued in possession of, so that he could not make a lease thereof; the feoffee demurr'd, because it was not alleg'd that the lease of Bl. Acre was made; but it was held that he need not to allege performance of that part, because it is impossible to be perform'd; and his performing the possible part is sufficient. And here he cannot make a sufficient lease, because the feoffee is always seised; and it is not intended that he should make a lease by estoppel, the words being that he should make a sufficient lease. Cro. E. 780. pl. 14. Mich. 42 and 43 Eliz. B. R. Wigley v. Blackwall.

31. If A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marries with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be perform'd, and this is regularly true in all cases. Co. Litt. 206. b.

32. A mortgagor, or obligor must on the day of payment seek the mortgagee or obligee, and tender the money, &c. if the mortgages, &c. be in the realm of England; but if he be out of the realm of England, the other is not bound to seek him there, but shall have the same benefit as if he had made a tender. Hawk. Co. Lit. 294. 295.

33. Queen Mary granted to T. a reversion in tail upon condition [248] that if T. or his heirs pay 20 s. at the receipt of the exchequer; &c. the grantee shall have a fee; resolved, that if afterwards the queen, under her great seal, refuses to receive the money, yet if the grantee tenders it at the receipt of the exchequer, he shall gain the fee; for the queen by no means can countermand or hinder the increase of the estate in such case. Adjudged 8 Co. 76. b. Trin. 7 Jac. Lord Strafford's case.

34. In covenant plaintiff counts that he by indenture leased his parsonage rendring rent, and the lessee covenanted to pay his rent. The lessee pleaded that before any day of payment, the parsonage was sequestred for non-payment of the first fruits; the court held this no plea; for he does not shew that any act was done by the plaintiff himself in his default, and he cannot say that the lessor had nothing at the time of the lease made; so in case of an obligation for payment of the rent; for he had bound himself to pay it, and the occupation is not material where the lease is for years or for life; but otherwise of a lease at will. Het. 54. Mich. 3 Car. C. B. Jeakill v. Linne.

Mich. 44 and 45 Eliz. ——— When a thing issues out of the profits, if the profits are taken away, that which issues out of them are also discharged. Ar. 3. Roll. Rep. 198. cites 20 H. 6. a rent is reserved out of land, if the land be evicted the rent is discharged, and so it is if he had entered into an obligation to pay the rent; because it issues out of the profits which are evicted, and consequently the obligation and rent are discharged.

35. If he, to whom a thing is to be done, hinder the other, that is to do it, ever so much, yet the other must use his utmost endeavours on his side to perform; and shew that he has done it, or else

he forfeits his bond, or breaks his agreement. 12 Mod. 532. Trin. 13 W. 3. per Holt Ch. J. in delivering the opinion of the court in case of *Lancashire v. Killingworth*.

(O. c) What *Things excuse* the Performance of Conditions, and what not.

Acts of him who shall have the Advantage.

[*Refusal.*]

[1. *I*F the condition be to do a collateral act, and not to pay money, which is of the nature of the principal sum, it seems if the obligee *refuses* it at the day, this discharges the whole obligation. D. 3. 4. Ma. 150. 84. 12 H. 4. 23.]

Br. Re-
pleader, pl.
14. cites
9 H. 6.

2. *Detinue* by executors of obligation bailed by the testator to the defendant, who said that he and N. D. bailed upon certain conditions, &c. and prayed garnishment against N. and had it; N. came and said that it was delivered upon condition, that if he refused to make such indenture to the testator when he should be required, that then it shall be delivered to the testator, and otherwise to the said N. and said that such a day he was ready to have made the indenture, and the testator refused; by which he prayed livery of the obligation; the plaintiff said that at another time, viz. such a day the testator required him and he refused, and the other said that he did not refuse, Prist, and so to issue, and found for the plaintiff; and it was pleaded in arrest of judgment, because when the testator *once refused*, the issue shall be upon this plea, and the refusal of the garnishee after is not material, and yet because he was bound that he should not refuse, therefore it seems that he shall not refuse at any time, and after the plaintiff recovered by judgment. Br. Conditions, pl. 49. cites 7 H. 6. 24.

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3 In quare impedit, a man seised of a manor with advowson appendant enfeoff'd 3, upon condition, that they or any of them who survived, or their heirs, within 40 days next after 10 years next ensuing the date of the charter, shall re-infeoff J. and E. his feme in tail, the remainder to K. in fee, and they made a deed accordingly with letter of attorney to W. P. to deliver seisin, and delivered it to the attorney of M. in the county of E. such a day, within the 40 days, and commanded him to make the feoffment accordingly; which attorney, such a day and year, at the manor offered to the baron to make estate within the 40 days according to the deed and condition, and the baron refused, and also the attorney was upon the manor all the 40 days, ready to have made livery. Br. Conditions, pl. 55. cites 19 H. 6, 67, 73, 76.

But per Affue, to that which is said, that by the refusal of the baron and feme in the principal case, that the feoffees ought to enfeoff R. to whom the remainder is limited, it is not so, for it is confessed that the baron and feme are alive, and R. ought not to have it till after their deaths; and therefore it seems that after their deaths they ought to infeoff him. And so it is the best opinion here, that by the refusal of the baron and feme, the feoffees shall not retain the land; for this was not the intent of the feoffor, therefore the entry of the feoffor lawful. *Ibid.*

4. And so it seems that *where time is limited*, if a man refuses at one time, he may agree at another day within the time, and all well. Quære. Ibid.

5. And if the *baron and feme die within the 40 days*, there the feoffees ought to make estate to R. to whom the remainder is limited, and if all die within the 40 days, the feoffor may re-enter; for the feoffor shall not lose the land where the condition is not performed, and no default in the feoffor. Ibid.

6. And if A. infeoffs B. upon condition to re-infeoff him in fee, and A. dies, yet B. ought to infeoff the heir of A. and if B. had tender'd a feoffment to A. and he refused, and died, yet the heir of A. shall make request, and shall have the land; quære inde where no time is limited. Ibid.

7. Debt upon obligation by J. B. against J. C. who said that the obligation is indorsed, that *if A. made estate tail to B. before Michaelmas*, that then, &c. and that *A. offered seisin to B. by deed sealed, and he refused*, and that the obligation was made to the use of the said B. It was held, that the refusal of G. shall save the obligation, because the obligation was to the use of G. and consequently G. was privy; but the same was not expressly ruled. Br. Conditions, pl. 140. cites 2 E. 4. 2.

8. Where a man is bound in an obligation to do a thing out of the obligation, as to infeoff J. S. by such a day, and he offers a feoffment, and the other refuses, he shall never be bound to make the feoffment, and the law is the same in like cases; but of things within, as an obligation of 20 l. to pay 10 l. notwithstanding that he refused the 10 l. offered at the day, yet he shall recover the duty after, viz. the 10 l. but not the penalty, for the 10 l. is within, and not dehors. Br. Conditions, pl. 145. cites 7 E. 4. 3.

ment of the doing of an act, &c. this is collateral to the obligation, that is to say, is not parcel of it, and therefore a tender and refusal is a perpetual bar. Co. Litt. 207. a.

9. And per Danby, the obligor shall say, that he attended all the day; contra per Littleton, for if the obligee refuses at one time it is sufficient; quod nota; which Brooke says seems to be law. Br. Conditions, pl. 145. cites 7 E. 4. 3.

10. Where the condition is to do a thing by a day, the refusal before the day is not material if he performs it at the day or before the day. Br. Conditions, pl. 67. cites 14 H. 8. 17. per Pollard.

11. Refusal and denier to him who is privy is material, and to a stranger is nothing to the purpose. Br. Conditions, pl. 26. cites 14 H. 8. 22.

(P. c.) [Excuse. Acts of the Obligee. [Refusal.] [250]

[1.] IF the condition be, that the son of the obligor shall serve the obligee for 7 years, if he tenders his son, and the obligee refuses, it is no forfeiture. 22 Ed. 4. 26. 2 Ed. 4. 2.]

T 3

2. A man

Condition.

2. A man is bound to *J. N.* that *A. B.* shall make obligation of 10 l. to the said *J. N.* by a day, and *A. B.* offers, and *J. N.* the obligee refuses, the obligation is not forfeited; for the refusal was by the obligee himself; contra if it shall be made to a stranger, and he refuses, &c. Br. Conditions, pl. 197. cites 10 H. 6, 16.

(P. c. 2) Tender and Refusal. Pleadings.

1. **D**EBT upon obligation, with condition that the defendant in-
seoff A. B. and his feme, and said, that he tendered estate to the baron and feme, and the baron refused; per Catesby, this is no plea, but shall say, that the baron and feme refused; but per Brian J. if the baron once refuses, the defendant is discharged for ever; and if the baron refuses, it is the refusal of the baron and feme. Br. Conditions, pl. 62. cites 15 E. 4. 5. 6.

2. And so it is held there, that refusal of a stranger to the obligation shall save the obligation. Ibid.

3. Debt upon obligation; the defendant said, that it is indorsed, that if the defendant, or any for him, come to Bristol such a day, and there shew to the plaintiff, or his counsel, sufficient discharge of annuity of 40 s. per annum, which the plaintiff claims out of two messuages in D. that then, &c. and said, that A. and B. by assignment of the defendant, came the same day to B. and tendered to shew to N. and W., of counsel with the plaintiff, a sufficient discharge of the annuity, and they refused to see it; judgment si actio; and the plaintiff demurr'd, and it was awarded no plea by all the justices, after great argument, because he did not shew what discharge he tendered, as a release or unity of possession, &c. for this lies in the judgment of the court to adjudge it; but they said, that if he came not there at the day, this shall be tried per Pais. Br. Conditions, pl. 183. cites 22 E. 4. 40.

(Q. c) [Excuse.] Acts of the Obligee.

[1. **I**F A. is obliged to B. and the condition is, that the son of A, shall serve B. for seven years, if B. takes him, and after, within the term, commands him to be gone from him, the obligation is not forfeited. 22 E. 4. 26.]

Bendl. 18.
 pl. 26. Anon.
 S. C. and
 the plea
 awarded
 good.

[2. If the condition of a bond be, that the obligee shall peaceably enjoy certain copyhold land without the interruption of any, and after the lord enters for a forfeiture by nonpayment of the rent according to the custom, yet the obligation is not forfeited, for this was the neglect of the obligee himself. Hill. 28 H. 8. Dier 30. pl. 205.]

[251] 3. A bond was conditioned to deliver to the obligee a release of &c. In debt brought the obligor pleaded, quod paratus fuit at the day to seal and deliver it, and that it was wrote, and wax fixed to the label, but the plaintiff refused to accept it; but by Chamberlaine J. the defendant did not do all that he might have done without the plaintiff, for he should have sealed it, but did not, and therefore the plaintiff's

plaintiff's refusal was not ill; for that would be acceptance of paper; and Haughton J. agreed. 2 Roll. Rep. 238. Mich. 20 Jac. B. R. Anon.

4. A. gave a bond for his true imprisonment, and after escaped, and the marshal assigns the bond to the plaintiff who sues it to judgment, *the obligee brings in the original defendant*, and the marshal accepts him, and per Cur. he by the acceptance has dispensed with the forfeiture of the bond. 12 Mod. 454. Pasch. 13 W. 3. *Mason v. Atherbury*.

(R. c) [*Discharged by*]
Acts of both.



[1. I F the obligor pays part of a small sum contained in the condition at the day, without any mention of the rest, yet the whole obligation is forfeited. 21 Ed. 4. 25. B.]

[2. If the condition be, that he shall not disturb the obligee in certain land leased to him; yet if he surrenders to the obligor, this is a good discharge of the obligation. 22 Ed. 4. 37. admitted.]

[3. [If a] condition [is] broke, performance with the acceptance of the obligee after will not excuse. 20 Ed. 4. 8. 6.]

Per Brian,
contra Suliard, and the
reporter says, *Id eo quere.*

4. If A be bound to an abbot that B. shall infeof the abbot by such a day; there if B. enters into religion in another house before the day, the obligation is forfeited; and *contra* if he enters into religion with the same abbot, for now the obligee is in default by acceptance of him into religion. Br. Conditions, pl. 127. cites 4 H. 7. 3.

(R. c. 2) *Excuse pro Tempore,*
Accident.

1. FINE by an abbot to find a chaplain to chant in such a chapel or church, the defendant said, that the church or chapel fell such a day, &c. so that he could not do his service there; per Keble this is no plea, for the conusor is bound to do it there, and therefore he shall make the chapel; but the opinion of the court clearly was, that the plea that the chapel was fallen was a good plea for the time, and that the conusee shall make the chapel who took the commodity of the services, and the judgment in these cases is *distingas ad faciendam servitiam*, which cannot be till the chapel be rebuilt; but judgment may be given, *quod cesset executio*, till the chapel be made, per Keble; but per Fineux *contra*. And this case of the divine service is the default of the plaintiff for not making of the chapel; so judgment shall not be given for the plaintiff where all the default is in the same plaintiff, and the defendant shall not do divine service in the place when the chapel is fallen, and it is a bar

Br. Conditions, pl. 241. cites 10 H. 7. 13. that the obligor is excused, Brook says *Quere if for ever &c.*

[252]

for the time; per Fineux, Brian and Danvers, but per Vavisor it is a bar for ever. Br. Bar, pl. 111, cites 16 H. 7. 9.

- S. P. Br. Conditions, pl. 241, cites 20 H. 7. 13.
2. So if a man be bound to carry the corn to the barn of J. S. and the barn falls, he is discharged of the carriage. Per Brian. Ibid.
 3. Covenant to levy a fine by him and his wife at the reasonable request; sickness of the wife is excuse, Mo. 124. pl. 270. Pasch. 25 Eliz.

See Tit.
accord, per
totum.

(S. c) In what Cases a collateral Thing may be given in Satisfaction of a Condition.

- 2 Brownl. 231. S. C. & S. P. by Coke Ch. J. —† If the condition
- [1. If a man be bound in 20 l. to do a collateral act as a feoffment, or to be bound in a statute, or to render a true account; there money or other thing given in satisfaction is no performance of the condition. Co. 9. * Peytoe 79. b. † D. 4 H. 8. 1, Perkins S. 753. contra † 9 H. 7. 18. per Vavisor. H. 13. Jac. B. R. between § Forwood and Dillon adjudged, (*) that money cannot be given in satisfaction. || 12 H. 4. 23. adjudged, Contra 4 H. 6. 23. admitted.]

(*) Fol. 450. be to make up an account, it is no plea that he made him a lease of a house and land in full satisfaction of all accounts, &c. D. 1. Pasch. 4 H. 8.

† S. C. cited 9 Rep. 79. b.

§ 3 Bulst. 148. Morewood v. Dickens, and was on a bond of 20 l. conditioned to deliver to the obligee before such a day so much lead; the defendant pleaded, that before the day at the request of the plaintiff himself he had paid one S. 10 l. which the plaintiff was indebted to him, and this he paid for the plaintiff in full discharge of the first bond, and that so the plaintiff had accepted of it. The whole court were clear of opinion that the plea was not good, and that so the plaintiff had good cause of demurrer, and gave judgment for the plaintiff — Rol'. Rep. 296. pl. 5. S. C. says it was adjudged per tot. Cur. against the plaintiff. (But it is added, that it seems it was for the plaintiff.)

|| Br. Conditions, pl. 41. cites S. C. for the condition being to be bound in a statute the acceptance of a lease of a house for his life in satisfaction is no performance, for this is a condition debors, and must be performed strictly. — Fitzh. Barre, pl. 189. cites S. C. —; Bulst. 148. Arg. cites S. C. — S. C. cited 9 Rep. 79. b. — Co. Litt. 212. b. S. P.

- In such case the payment of another thing is
- [2. But when the condition is to pay money there any other collateral thing will be a satisfaction. Co. 9. * Peytoe, 79. † 19 Ed. 4. 1. B. † 12 H. 4. 23. B.]

good, if the obligation be to pay a certain sum of money; per Coke Ch. J. 2 Brownl. 131 in S. C.

† Br. Conditions, pl. 161. cites 18 E. 4. 15. 17. 20. and is the S. C. with that of 19 E. 4. 1. b. — Fitzh. Barre, pl. 189. cites S. C.

Co. Litt. 212. b. S. P. and says not only things in possession may be given in satisfaction, but also if the feoffee or obligee accept a statute or a bond in satisfaction of the money, 'tis a good satisfaction. — 3 Bulst. 149. S. P.

Debt upon condition upon obligation to pay 10 l. before such a day; the defendant said that before the day of payment he delivered a horse in full satisfaction, to which he agreed, judgment si actio, and a good plea; by which the plaintiff took the receipt by protestation, and traversed the agreement; but it seems there that it is a good plea that he did not pay the horse. Br. Conditions, pl. 199. cites 2 R. 3. 22. — Co. Litt. 212. b. S. P.

- [3. A man bound in 200 quarters of malt, upon condition to pay 20 l. A ring or horse, or other collateral thing, is a satisfaction. Co. 9. 79. [a].]

[4. So

Condition.

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[4. So a *feoffment* upon condition to pay 20 l. A collateral thing Co. Litt. 212. b. S. P. is a satisfaction. Co. 9. *Peytoe*, 79. [a].] — In case of feoffment

in mortgage, if the feoffor pay to the feoffee a *horse* or *gold ring*, &c. in full satisfaction of the money, and the other receives it, it is good enough, and as strong as if he had received the money, though the horse was not the twentieth part of the value, because the other had accepted it in full satisfaction, Co. Litt. 8. 344.

[5. A man bound in 20 *quarters of grain*, conditioned to pay five *quarters*, money or other collateral thing, is not a satisfaction, because of the original contract.]

[6. But *otherwise* it is in contract without deed. Co. 9. 79. b.] In such case payment of money is a clear discharge of the contract; per Houghton J. 3 Bull. 149.

[7. If the condition be to pay a *less sum* at a day; if the obligee agrees that he shall pay an *horse*, or other thing in satisfaction, yet if he *refuses* it, the obligor ought to pay the small sum at the day, otherwise he hath forfeited the obligation; for the agreement by *parol*, without acceptance, cannot alter the agreement by deed before. 19 E. 4. 1. b. 2.] Br. Conditions, pl. 161, cites 18 E. 4. 15. 17. 20. and is the commencement of the

S. C. cited by Roll; but if the obligee accepts the horse in recompence, this is a good discharge of the bond. Ibid.

[8. So if the condition be to erect an *house of such a length*, &c. he cannot plead another agreement in another manner in satisfaction thereof, unless it be by deed. 19 E. 4. 2. 6. per Curiam.]

[9. So if the condition be to pay a *small sum* at D. at such a day; an agreement to pay at another place, without acceptance, is not a discharge. 19 E. 4. 1. b.] So in debt on a bond, the defendant pleaded that before

the day, the plaintiff, in regard the plaintiff's cattle had done some trespass on the defendant's lands, gave him a longer day of payment of the money, which day is not yet come; adjudged per tot. Cur. to be no plea, because a parol agreement cannot dispense with a bond. Cro. E. 697. pl. 8. Mich. 41 & 42 Eliz. B. R. Hayford v. Andrews.

[10. So if a thing be to be done by implication of law to the person of any person, and the obligee appoints him to do it at a place in certain, yet if the person be not there to accept it, it is not discharged, but the other ought to seek him. 19 E. 4. 1. b.] Br. Conditions, pl. 161, cites 18 E. 4. 15. 17. 20. and is part of the S. C.

[11. If a condition of an obligation be to pay 10 l. at a day at D. if the obligee accepts it at another place, it is a good performance without deed. * 41 E. 3. 25. † 46 E. 3. 29. b. ‡ 3 H. 4. 9. ¶ 11 H. 4. 50. 62. 21 E. 3. 45. 49 E. 3. 6.] * Br. Conditions, pl. 21, cites S. C. — Fitzh. Dette, pl. 121, cites Br. Dett. pl. 43, cites S. C. † Br. Estoppel, pl. 53, cites S. C. — Fitzh. Estoppel, pl. 95, cites S. C. ¶ Br. Charters de Terre, pl. 20, cites S. C. but not S. P.

S. C. — See (Q. b) pl. 1, 2. S. C. — † Br. Conditions, pl. 31, cites S. C. — Br. Dett. pl. 43, cites S. C. ‡ Br. Estoppel, pl. 53, cites S. C. — Fitzh. Estoppel, pl. 95, cites S. C. ¶ Br. Charters de Terre, pl. 20, cites S. C. but not S. P.

[12. So if the defeasance of a statute be to pay at D. so much rent. 46 E. 3. 4.] Br. Defeasance, pl. 14, cites S. C. & S. P.

as to payment of money, but mentions nothing as to rent. — Fitzh. Audita Querela, pl. 1, cites S. C. — (Q. b) pl. 2. S. C.

[13. If

[13. If a condition be to pay a rent to the obligee, an agreement to pay to his bailiff, who refuses, is no plea without deed. Dubi-

[254] tatur, 9 H. 6. 29. b.]

Br. Condi- [14. If a condition be that a stranger shall infeoff the obligee of
tions, pl. 24. land, which the stranger tenders, and he refuses to accept, but by his
cites 42 E. 3. 23. [and command he infeoffs another, this is a good performance without
is at 23. a. deed. 42 E. 3. 22. b. It seems the refusal is the great cause
pl. 2. and thereof, yet there the issue is taken upon the command.]
not at 22
b. as in

Roll.] and the plea held good; but Brook says quod mirum! because the contrary is held Trin. 12 H. 4. 23. because things de hors shall be taken strictly; but payment to the plaintiff and payment to a stranger by his command is all one.—Fitzh. Barre, pl. 190. (bis) cites S. C.

Br. Condi- [15. If the defeasance of a statute be to pay 10 l. rent at a day, it
tions, pl. 32. is a good performance without deed, that he paid part for the ex-
cites S. C. pences of one of the conusees, and the residue for the reparations of the
but says no- thing as to houses (which he himself was not bound to repair) by the command
thing as to performance of the conusee. 46 E. 3. 33. b. adjudged.]
being with-
out deed,

but only that it was by command of the conusee, and awarded a good performance; and Brooke says that so it seems it amounts to a payment per auter mains; quod nota.—Br. Audita Querela, pl. 6. cites S. C. accordingly.

Br. Condi- [16. If a lease be made by deed, rendering rent upon condition,
tions, pl. 228. cites S. C.— it is a good performance, that by accord the rent should be re-couped
S. C.— for the table of the lessor. 47. E. 3. 24. b.]

Br. Cove-
nant, pl. 13. cites S. C. but Brooke says, quere if such agreement without deed be sufficient to discharge a covenant which is by deed; for by Parn. it is not sufficient.—A condition was to pay money at Mich. and it was agreed between the parties that the plaintiff should retain so much rent as the monies due to the obligee on the day they were payable should amount unto, in satisfaction of the monies; but because the rent was not due till after that day, he could not contract for it, and consequently the condition was not performed. Arg. Roll. Rep. 296. cites Mich. 40 & 41 Edw. Andrews v. Harrington. But says that it was there agreed, and that so is 22 E. 4. 5. that otherwise it is in case of 2 obligations because both are outies.

[17. If I deliver money to another without deed to my use, and make a defeasance by deed to pay a less sum, if I accept corn in satisfaction without deed, this is not any discharge. Contra, 18 E. 3. 39. b.]

* Fol. 457.

[18. If the obligee accepts the thing to be done after the condition is broke, (*) yet this is not a discharge of the obligation without deed. † 46 E. 3. 29. b. † 47 E. 3. 14. Contra, 18 E. 3. 58. b.]

† Br. Con-
ditions, pl.
31 cites

S. C.—Br. Dett. pl. 43. cites S. C.

‡ Fitzh. pl. 218. cites S. C.

Fitzh.
Barre, pl.
224 cites
S. C.

[19. If the condition be to stand to an award to be made such a day; if at the day no award is made, but the arbitrators, by assent of parties, appoint another day to do it, and do make it at the day, yet he is not bound to perform it. 49 E. 3. 9. demurrer.]

[20. If a grantee of an annuity, pro consilio impendendo, promises the grantor to come to a certain place at a certain day to give him counsel, if he does not come at the day there, yet the condition is not broke, for he is not bound by the condition to go there, and this cannot alter it. 21 E. 3. 7. b.]

21. If the disseisee takes homage of the disseisor, this shall bind him for his life, and *contra* against the heir in writ of entry sur disseisin. Quære of the disseisee. Br. Acceptance, pl. 16. cites 17. Aff. 3.

22. Debt for meat and drink, it was said for law that it is no plea that a stranger has made an obligation to the plaintiff for the same debt, *contra* to say that the plaintiff himself has made an obligation to him for the same debt, tho' it be in such action of debt in which the defendant may wage his law. Br. Dette, pl. 19. cites 28 H. 6. 4.

23. Condition of a bond was, that a stranger shall pay to the obligee 10 l. such a day. The defendant pleaded acceptance by the plaintiff of a horse in satisfaction at the day. This was held a good plea; but if the payment had been to be made by the stranger, or by the obligor himself to a stranger who had accepted such recompence, the plea would not be good; for it ought to be performed strictly according to the condition. D. 56. a. b. pl. 18, 19. Trin. 35 H. 8. Anon. [255]

24. When the condition is for payment of money, there is a diversity when the money is to be paid to the party, and when to a stranger; for when the money is to be paid to a stranger, there if the stranger accepts an horse, or any collateral thing in satisfaction of the money, it is no performance of the condition, because the condition in that case is strictly to be performed; but if the condition be, that a stranger shall pay to the obligee or feoffee a sum of money, there the obligee or feoffee may receive a horse, &c. in satisfaction. Co. Litt. 212. b.

25. Right or title of freehold or inheritance cannot be barr'd by any collateral satisfaction but by release or confirmation, or some act which is tantamount. 4 Rep. 1. Mich. 14 & 15 Eliz. Vernon's case. Arg. cited Roll. Rep. 297. in case of Forwood v. Diction.

26. Debt on a single bond for 8 l. The defendant pleaded, that after his entering into that bond, he enter'd into another to the plaintiff of 14 l. for the payment of 7 l. at such a place and day not yet come, which the plaintiff accepted in discharge of the said bond for 8 l. Adjudged for the plaintiff that the plea was ill, and not any bar. Cro. E. 716. pl. 40. Mich. 41 & 42 Eliz. C. B. Manhood v. Crick.

27. Debt on a bond; the defendant pleads that he hath given a bill of exchange in satisfaction, and ruled a good plea. Comb. 19. Pasch. 2 Jac. 2. B. R. Hilliard v. Smith.

28. The reason why a collateral thing cannot be satisfied with money, or other collateral thing is, because the collateral thing is not due, and so no contract can be made of it till the day of payment. Arg. Roll. Rep. 296. pl. 5. Hill. 13 Jac. B. R. in case of Forewood v. Diction. And per Coke Ch. J. the reason why money may be satisfied by other collateral thing is, because it is of a certain value. Arg. Roll. Rep. 297. Hill. 13 Jac. B. R. in case of Forewood v. Diction.

29. In debt by an executor upon a bond to his testator, the defendant confessed the bond, but pleaded, that he gave another bond to the testator in satisfaction of that bond, which bond the testator accepted

cepted of in satisfaction. The court held it an ill plea to say, that one did accept of one chose en action (for so is a bond till the debt is recovered) in satisfaction of another chose en action, and here the defendant has confessed the debt, and at another day judgment was given against him. Style 339. Mich. 1652. B. R. Brock v. Vernon.

30. A. sells land to B. A. takes a lease of the same lands of B. at a rent beyond the value, with a condition of *re-entry*, and gives collateral security for the *payment of the rent*. A. was arrear 5 years rent. B. re-enter'd. A. could have no *relief* against the collateral security without payment of the arrears, as well after as before the re-entry; the land was worth but 160 l. but the rent was 250 l. per annum. Chan. Cases 261. Trin. 27 Car. 2 Anon.

31. A. is bound to B. to pay B. 100 l. B. may take any collateral satisfaction for it; but if A. is bound to B. to pay C. 100 l. there C. shall not receive any collateral satisfaction to save the bond, for he cannot alter the terms of an agreement made between strangers; per Holt Ch. J. Farr. 144. Hill. 1 Ann. B. R. in case of Booth, alias Gould v. Johnson.

[256] (T. c) *Who may dispense with a Condition.*
A Stranger.

[1. IF the condition of an obligation be, to assure a copyhold to A. and B. his wife, (who are strangers to the obligation) for the life of C. and the obligor at the request of A. surrenders it to the use of A. &c. to the use of such person as he shall nominate, this is not any performance of the condition; for A. who is a stranger cannot dispense with the condition, nor by his agreement alter the thing to be done, but he ought to take it as the condition limited it. Mich. 15 Jac. B. R. between Stile and Smith adjudged upon a demurrer.]

(U. c) What Things will excuse the Performance of a Condition.

Acts of him that shall have the Advantage. *Absence.*

[1. IF a thing be to be performed by a condition, which cannot be performed without the presence of the obligee there his absence shall excuse the performance. 12 H. 4. 23. h.]

[2. If a condition be to make a feoffment to the obligee, if the obligee be not present at the time, the performance is excused. 12 H. 4. 23. implied.]

Br. Entre
congeable;
pl. 39. cites

[3. If a rent be reserved to be paid at a certain day upon condition, if the lessee be ready at the day, and none comes for the lessor, this

this will excuse the performance of the condition. (And here the lessor ought to demand.) Contra 4 H. 6. 9.] S. C. — Ibid. pl. 81. cites 40 Aff.

accordingly. — See Tit. Rent (P. a) pl. 2. S. C. and the notes there. 11. S. P.

[4. If the condition be *to enter into a statute to the obligee*, if the obligee be absent at the day, yet because it *may be performed in his absence*, he ought to do it. 12 H. 4. 23. b. Otherwise e contra. 12 H. 4. 24. b.]

[5. If an abbot covenants with B. *to sing mass such a certain day in his manor of D. for him and his servants*; though B. nor his servants do not stay there, yet he ought to sing. 42 E. 3. 3. b.]

[6. If a condition be *to take an estate to himself for life, remainder to another*, (who is *privy to the condition*, and is to have benefit by the obligation) *at a certain day*, though he in remainder be not there at the day, yet it is forfeited if it is not taken accordingly; For this may be performed notwithstanding his absence. 40 E. 3. 12.] Br. Conditions, pl. 226. cites S. C. accordingly; for he may lease for life, remainder to the plaintiff, or grant it otherwise, though the plaintiff be not present. — Br. Garnishment, pl. 12. cites 40 E. 3. 11. S. C. adjudg'd for the plaintiff; for it was not said in the negative, that if the plaintiff did not come that no estate should be made.

[7. But in this case, if the condition had been also, *that he in the remainder should be present at the day*, his absence would excuse the performance of the condition, scilicet, of the taking of the remainder, and of the lease to himself also. Contra 40 E. 3. 12.]

8. *He who will have advantage of the condition shall make the attendance*, and therefore in debt upon an obligation the obligor shall make the attendance, *and so it shall be pleaded*, and upon lease for years the lessor shall make the attendance. Br. Entre Congeable, pl. 2. cites 20 H. 6. 30, 31.

9. *For he of whose part it comes to plead the condition*, shall make mention of the whole day, which see in the end of the book *Intrationum Placitorum*. Br. Entre Congeable, pl. 2. cites 20 H. 6. 30, 31.

10. And therefore it was said, that the tenant may come the last instant of the day, and this suffices, and of the obligee the like; contra ex parte the obligor or lessor, for they shall plead the condition, and therefore they shall make the attendance. Br. Entre Congeable, pl. 2. cites 20 H. 6. 30, 31 & 32, & 36 H. 8: accordingly.

11. In debt, A. was bound in 40 l. to B. *that C. should infeoff B. of such a manor by such a day*, and said, *that the said C. such a day, viz. in the vigil of the day, was upon the manor all the day to have infeoff'd B. and B. did not come all the day*. Sulyard said, that B. was there upon the manor all the day to have taken the estate, absque hoc that C. was there, and good; for the first plea in the affirmative ought to make the issue, and the refusal of the obligee is not material in this case. Br. Conditions, pl. 186. cites 22 E. 4. 43.

[257]

(X. c) What

(X. c) What Thing will excuse the Performance of the Condition.

In what Case he, that shall have advantage, ought to do the first Act.

Acts of him that shall have the Advantage.

[1.] If the condition of an obligation be, *that the obligor, being a parson, should resign to the obligee within a certain time for a certain pension as they should agree, the obligee ought to agree for pension, and tender a deed thereof to the obligor before he is bound to resign.* 14 H. 4. 18. b.]

Br. Conditions, pl. 42. cites S. C. accordingly, per Curiam.

Fitzh.

Barre, pl. 19c. cites S. C.

[2.] If an annuity is granted till he is promoted to a benefice by the grantor; if the grantee after accepts a benefice from another, and after the grantor proffers him a presentation to his benefice, and he refuses, the annuity is determined. 17 Ed. 3. 11. dubitatur.]

* Br. Entre Congeable, pl. 3. cites S. C.

[3.] Where a rent is to be paid upon condition at a certain day, he cannot enter for the condition broke before a demand of the rent. * 20 H. 6. 30, 31. † 40 Aff. 11. adjudged.]

Fitzh. Entre

Congeable, pl. 6. cites S. C.

† And Fitzh. Ibid. cites 40 Aff. accordingly.—Br. Conditions, pl. 216. cites S. C.—Br. Entre Congeable, pl. 81. cites S. C.

[4.] And the demand ought to be at the day, and it is not sufficient after. Contra 20 H. 6. 30, 31.]

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Br. Entre

Congeable,

pl. 39. cites

S. C.

Ibid. pl. 81.

cites 40 Aff.

pl. 11. S. P. accordingly.—See Tit. Rent (P. 2) pl. 2. S. C. and the notes there.

* Br. Entre

Congeable,

pl. 2. cites

S. C.

[6.] If the condition of an obligation be to pay a sum at a certain day, the obligor ought to tender it without any demand. * 20 H. 6. 30. 2 Ed. 4. 3. b. 8 Ed. 4. 1.]

Br. Arbitre-

ment, pl. 17.

cites S. C.

but S. P.

does not ap-

pear.—

Fitzh. Arbitre-

ment, pl. 15.

cites S. C. & S. P.

by Catesby, which Jenny agreed.

[7.] If I am bound to be attendant upon you at all times when you come to your manor of D. I shall be bound to take notice when you come to your manor of D. at my peril, without any notice given by you. 8 Ed. 4. 1. b. per Bingham.]

Br. Arbitre-

ment, pl. 37.

cites S. C.

and says it

is much

argued, where

[8.] If the condition of an obligation be to stand to the award of J. S. &c. who awards a certain thing to be done to another at a day, he ought to perform it at his peril, without any notice given by any other. 8 Ed. 4. 1.]

the notice ought to be given, especially where the obligation is made to the arbitrator himself, but it was not adjudged. — Fitch. Arbitrement, pl. 15. cites S. C. and says, vide I. librum, for it was well debated three times, and several good matters are in the case. — Br. Notice pl. 18. cites 8 E. 4. 1. 10. S. C. — 8 Rep. 92. b. in Francis's case, per Cur. cites * 18 E. 4. fol. [18.] a. & 24. a. that it was held by all the court, that the plea of want of notice was sufficient, and that it was there agreed by Brian, Vavasor, and Catesby J. that in such case of Arbitrement the obligor must take notice at his peril, and said, that so it was adjudged in the same king's time in B. R. and that so the law is without question against a sudden opinion in 8 E. 4. fol. 1. a.

* Br. Notice, pl. 13. cites S. C. — Br. Dette, pl. 168. (169.) cites S. C.

9. A man was bound in a bond to make a sufficient lease to the obligee before such a day, the same to be made at the costs of the obligor; in debt upon the bond it was holden a good plea, that the plaintiff did not tender the costs to him, and if he had, that then he was ready, &c. Mo. 22. pl. 76. Hill. 3 Eliz. Anon. Dal. 27. pl. 10 S. C. in totidem verbis.

10. D. made a deed of feoffment of lands in divers counties, dated 15th Octob. 4 Mariz, upon condition the feoffee should re-infeoff him of all the lands within 20 days after the date of that deed, and it was resolved that if D. made his feoffment but of part within the 20 days the condition was not broken, though all were not reconveyed within the 20 days according to the letter of the condition, which is entire. The reason was, because it was his own fault that it was not conveyed, without which it could not be conveyed, and therefore the letter was abridged, the condition being taken that he should reconvey so much as was conveyed. Hob. 24. cites it as resolved 26 Eliz. in lord Dacre's case.

11. Condition was, if obligor before Easter pay 100 l. so as obligee be ready at payment thereof to enter into bond of 200 l. with sureties to purchase such land, &c. that then, &c. per Wray Ch. J. the first act is to be done by the obligor, and at the payment the other is to do that which to him belongs to do. 4 Le. 91. pl. 190. Pasch. 31 Eliz. B. R. Harris v. Whiting.

12. Covenant to seal and deliver a lease for years to commence from Michaelmas next, and a bond for performance of covenants, and on an action of debt brought on that bond, the breach assigned was, that the obligor had not made any part of such lease before the said time, whereupon the obligee put one part in writing and tendered it to the obligor to seal, which he refused. Et per Cur. where a man covenants to seal and deliver a deed, he is bound to put it in writing; but if he refuse, the covenantee may do it, and 'tis warranted by law. 2 Roll. Rep. 177. Trin. 18 Jac. B. R. Steele v. Spight. [259]

13. A. covenants in consideration of 20 l. paid, and 50 l. more to be paid, to grant a lease of an house to B. to have and to hold for the life of B. and of two other such persons as B. should name, and after covenants to deliver possession before Christmas; B. does not name the two lives before or at Christmas, nor does A. give possession. B. brings covenant because A. did not give possession; but adjudged for defendant. Cart. 206. Trin. 21. Car. 2. C. B. Twiford v. Buckley.

14. Debt upon bond conditioned to pay 1500 l. the plaintiff assigning over to the defendant such a judgment. Defendant pleads that plaintiff had not assigned. Plaintiff replies, that he was ready to assign.

fig. Judgment pro Quer. for it was said that payment of the money, and assignment of the judgment, were concomitant acts; and therefore the defendant could not excuse himself merely upon the neglect of the plaintiff, but ought to have pleaded *tender* of this money, though he was not bound to have paid the money in consequence of the tender, unless the judgment was at the same assigned over to him! 10 Mod. 153. 189. 222. Pasch. 13. Ann. B. R. Turner v. Goodwin.

(Y. c) In what Cases the Obligee ought to do the *first Act*.

[And *what* is a *sufficient* doing such first Act.]

Every one of the books here mentioned seem to be mis-cited; for [1.] If the condition of an obligation be *to levy a fine to the obligee*, he is not bound to levy it, if the obligee does not *sue a writ of covenant* against him. 18 Ed. 3. 27. b. 8 Ed. 4. 2. b. per Markham, 21. b. Co. 5. Palmer 127. 7 Ed. 4. 2. b.]

I do not observe any such point in any one of them, nor any thing applicable thereto.—But Hutt. 48 Hill. 19 Jac. Walrond v. Hill, the condition of a bond was, *that such a one and his wife, before Easter term, &c. should levy a fine of such lands to the plaintiff*; the defendant pleaded, *that before the end of that term the plaintiff did not sue forth a writ of covenant* whereupon a fine might be levied, and Hobard Ch. J. was of opinion it was a good plea; for that the plaintiff out to procure the writ to have, made himself capable of the fine.—Win. 29. Hill v. Waldron, Pasch. 23 Jac. C. B. the S. C. & Hobard Ch. J. said it was not reasonable to compel the obligor who is a stranger to the estate, which passes by the fine to sue out a writ of covenant, to which Hutton J. agreed, but Winch doubted.

[2. If the condition be *to levy a fine upon warning* given; if he be *summoned in a writ of covenant*, this is *sufficient* warning. 29 Ed. 3. 44. b.]

[3. If a *defeasance* be *to pay a small sum* in discharge, &c. *he ought to pay it at the day, though the plaintiff will not give him any acquittance* for it; because in an action for the principal sum, he may plead payment of the less sum, without any acquittance. Quære, 18 Ed. 3. 39. b.]

[4. If a condition be *to inroll a deed* in Guildhall, he is not bound to do it before *request* made by the other. 39 Ed. 3. 3.]

[260] 5. A lessee for years upon condition, that *if the lessee sell, the lessor to have the first offer; he giving as much as another*; here the lessee ought to demand, if the lessor will give as much for the term as another will, if he say, No, he ought to shew him no more; but if the lessor say that he will, then the lessee ought to *shew how much another will give more*. And this question the lessor is to determine of presently; for it was no reason to defer the sale while he considers of it. Dyer, 13. b. 14. a. pl. 65. &c. Trin. 28 H. 8. Anon.

Hutt. 8. Arg. cites the case of Burnell v. Brook, S. P. accordingly, and seems to be S. C. 6. An obligation was conditioned, *that J. S. shall acknowledge a judgment* in C. B. to J. D. In debt the defendant pleaded, *that the plaintiff had not sued forth any original writ*, and it was held a good plea. Arg. Win. 30. cites Pasch. 4 Jac. Burnell v. Bowle.

7. Covenant

7. Covenant was at the end of two years to procure a deputation for J. S. *Proviso, that upon the granting thereof J. S. should give security for payment of 100 l. per annum rent for it and performance of covenants.* J. S. need not give security till the deputation made. Cro. J. 297. pl. 4. Hill. 9 Jac. B. R. Barwick and Turner v. Gibson.

8. In debt on bond conditioned *to make all the linen for the necessary wearing of the obligee during his life*, the court held, that the obligee must deliver to the obligor the cloth of which it is to be made; for all contracts are to be interpreted according to the intent and subject-matter. As if a seamstress is bound to make me a linen-suit she is to find the linen, but it is not thereon that the obligor was a seamstress, or such person as used to make linen and send the stuff; and therefore judgment was given for the defendant. Lev. 93. Hill. 14 and 15 Car. 2. B. R. Oles v. Thornhill.

Keb. 466. pl. 69. Oates v. Thornhill. S. C. Windham said, that the intent must guide contracts, and here it appears that the plaintiff is a seam-

stress, and it is her proper trade to make linnen, and therefore, as a tailor, she is not bound to find the linnen, which Twisden agreed; but otherwise of a shoe-maker or goldsmith; and judgment for the plaintiff.

9. *So if a tailor is bound, or promises to make a suit of cloaths for me*, I ought to deliver him the cloth, because this is usual, and not for him to provide it; Per Cur. Lev. 93. in S. C.

10. *But if a shoe-maker is bound to make me a pair of shoes*, he is also bound to find the leather, because it is usual; Per Cur. Lev. 93. in S. C.

11. Debt on bond, conditioned *to pay such costs as should be stated by 2 arbitrators by them chosen*, defendant pleads that none were stated, plaintiff replies that *defendant brought not in his bill*, to which it was demurred; for tho' if the defendant were the cause that no award was made, it was as much a forfeiture of his bond as not to perform it would be; yet here there was a precedent act of the plaintiff's necessary, viz. to choose an arbitrator, which he ought to have shewn before any fault could be assigned in the defendant in not bringing in of his bill, and to this the court did incline. Sed Adjournatur. Vent. 71. Pasch. 22 Car. 2. B. R. Baldway v. Ouston.

12. If by the agreement of the parties, *2 acts are to be done, and time is limited for doing of one, and no time for the other*, there if the nature of the thing will bear it, that thing is to be done first for which the time is limited. Arg. 10 Mod. 224. Pasch. 13 Ann. B. R. in case of Turner v. Goodwin, cites Vent. 147. Saund. 319. Cro. C. 384, 385. 2 Saund. 350. 352. Lutw. 251. 490. 565.

(Y. c. 2) Demand. Necessary; in what Cases. [261]

1. **D**EBT upon indenture of covenant to pay 4 l. annually, and 12 s. rent per ann. *ad quas conventiones perimplend'* the defendant bound himself in 100 l. by the same indenture, and brought debt, and counted that the one and the other were arrear; and the defendant said that he was at all times ready to pay, and yet is, and

tendered the money in court, *absque hoc*, that the plaintiff required it; and by the best opinion he ought to pay it at the day without request, because he is bound to pay it; and *contra* where he grants annuity; there it is no damage unless the grantee requires payment; note a diversity. Br. Conditions, pl. 153. cites 11 E. 4. 10.

But if he be bound in another obligation to pay the first sum, there he ought to tender; quod non negatur. Ibid.

2. Debt upon obligation, that if the plaintiff shall enjoy an annuity which the defendant had granted to him out of the manor of Dale, according to the form of the gift, that then, &c. and said that at every day he was ready to pay. Quære if he ought to tender; because if a man be bound in a single obligation payable at such a day, there he need not pay without request, and the plaintiff shall not recover damages without request. Br. Tender, pl. 22. cites

14 E. 4. 4.

If no day of payment is limited, it is not payable before request. Br.

3. In debt upon a single obligation the plaintiff ought to request payment; but upon an obligation of a greater sum, to pay a less, the defendant ought to tender it. Per Husley Ch. J. Br. Tender, pl. 25. cites 21 E. 4. 42.

Tender pl. 14. cites 14 H. 8. pl. 29. — S. P. but *contra* of condition to pay such a day, &c. Br. Tender pl. 27. cites 14 H. 8. 29.

4. If a man be bound to me in 20 l. by single obligation, he is not bound to offer it before request. Br. Tender, pl. 34. cites 21 E. 4. 50. 42.

5. But if he be bound in 40 l. by another obligation to pay the sum in the first obligation, there the defendant ought to tender it. Br. Ibid.

6. And if no day be limited, he ought to do it in as convenient time as he can, quod nota. Ibid.

7. If a man is bound in 20 l. to pay 10 l. there he shall make tender at his peril. Br. Tender, pl. 43. cites 16 H. 7. 14.

8. So where he is bound to perform an arbitrement. Ibid.

9. But where it is by contract or single obligation, there the creditor ought to make request, and upon this the debtor ought to be ready to pay, and there without actual request the plaintiff shall never recover damages; per Brian and Fineux, and therefore the request shall make the issue. Ibid.

10. Debt upon bond condition'd, that the obligee, his heirs and assigns, shall, and may lawfully hold and enjoy a messuage, &c. without the let, &c. of the obligor, or his heirs, and of every other person discharged, or else, upon reasonable request, save harmless by the obligor from all former gifts, &c. The defendant pleaded, that no request was made to save harmless. Adjudg'd for the plaintiff, because the condition has two parts, one for enjoyment, the other to save harmless upon request, and to the enjoyment of the land the defendant has not made any answer. Mo. 591; 592. pl. 797. Trin. 39 & 40 Eliz. C. B. Creswell v. Holmes.

11. Debt upon bond with condition to resign a benefice within 3 months after request, viz. at the parsonage house of C. that then, &c. the defendant pleaded non requisivit, upon which they were at issue, and the jury found for the plaintiff, who had judgment accordingly.

It was assigned for error, 1st. that the plaintiff did not set forth the request precisely at the parsonage-house, but alleged a request at the parsonage-house of C. by a (viz.) sed non allocatur; for it is the usual course; 2dly, that he did not shew that the defendant was there present, or had notice of the time of the request; but non allocatur; for being alleged to be made unto him at the said place, it must necessarily be intended that the defendant was present, and had sufficient notice of it, otherwise they ought not to have found the request. Cro. J. 274. pl. 2: Pasch. 9 Jac. B. R. Lawrence v. Johns.

12. A. covenanted to transfer stock to B. provided that B. such a Skinn. 391. day by word, or by writing, left at the East-India-House in Leaden- pl. 27. S. C. Hall-street, demand the said stock to be transferr'd to him. Upon Adjudged the day B. made demand ore tenus (and not by writing) at the East India-House, and held good; and that it need not to be to the person, nor at the last hour of the day. Per Cur. and judgment for the plaintiff. Carth. 268: Per Cur. Pasch. 5, W. and M. in B. R. Hall v. Cupper.

(Z. c) Demand. Where another than he who is to perform the Condition is to do the first Act.

Fol. 456:

Sec Tit. Penal Bill.

(A);

Sec Tit.

Rent (J.)

(P. 4)

* Cro. E.

462. (bis)

pl. 13. B.

rough v.

Taylor.

Pasch. 38

Eliz. B. R.

the S. C.

but S. P.

exactly does

not appear.

—Mo. 404.

pl. 540.

Burrough

v. Taylor.

S. C. and

[1. IF a man leases land for life, or years, or &c. reserving a rent, and default of payment, a re-entry. The lessor ought to demand the rent at the day, otherwise the condition shall not be broke by the non-payment of the rent.]

[2. So if a man leases land, reserving a rent to be paid at a place out of the land, upon condition of non-payment to re-enter; though the rent be to be paid out of the land, yet this is a rent and not an annuity, and therefore the lessor ought to demand it at the day, otherwise he shall not enter for the non-payment. Co. 4. * Boroughs 73. resolved. Hill. 32 Eliz. B. R. between + Smith and Bostard, per Curiam, and said to be so lately adjudged. Hill. 32 El. B. R. admitted. Trin. 39 El. in Camera Scaccarii, between + Edmunds and Buskin, per Curiam in a writ of error upon a judgment in B. R. where it was so adjudged. But Trin. 39 El. B. R. contra, Go. Kid. and Brand 71.

was of a lease by the queen, in which the rent was made payable at the receipt of the Exchequer, and the queen granted the reversion to D. who demanded the rent of the receipt at the Exchequer, and the tenant tender'd it upon the land; and adjudg'd for the defendant that the tender was good; for the grant of the reversion had alter'd the place of payment from the Exchequer to the land. — Couldh. 124. pl. 9. Hill. 43 Eliz. S. C. adjudg'd that the grantee of the reversion must demand the rent on the land; for now the rent shall ensue the nature of other rents reserved by common persons; and such are payable on the lands.

+ Le. 141. pl. 198. Trin. 31 Eliz. Smith v. Bustard. S. C. but S. P. does not appear. — S. C. cited 20 Rep. 129. a. but S. P. does not appear.

¶ Cro. E. 415. pl. 7. Mich. 37 & 38 Eliz. B. R. Buskin v. Edmunds, S. C. which was a lease of lands in Bucks, rendering rent at the receipt of the Royal Exchange in London. Gayly J. held that there needed not any demand; but all the other justices held that there ought to be a demand at the place where it was payable, for it remains a rent which in its nature is demandable by him who would have it, and that so it had been adjudged, and judgment accordingly that the entry of the lessor was not lawful. — Ibid. 535. pl. 69. Mich. 38 & 39 Eliz. in Cam Scacc. and all the justices and barons held that there ought to be a demand, besides Anderson, who held e contri; for he said that it being appointed to be paid out of the land, it is only a sum in gross, and no rent. — Cro. E. 636. pl. 31. Mich.

Mich. 40 & 41 Elis. B. R. is upon a D. P. — [* This should be Pl. Com. Kidwelle v. Brand. — Mo. 598. pl. 821. S. C. adjudg'd that the rent ought to be demanded, or no re-entry can be; contrary to Kidwelle's case in Pl. C. — And so of Kidwelle's case in Pl. C. 70. as to this point was utterly denied by the whole court. 4 Rep. 73. a. — Co. Litt. 202. a. S. P. accordingly, and cites S. C. — See Tit. Rent (I) pl. 3. and the notes there. — And see Tit. Rent (K) (L).]

[263]

Hob. 133. [3. [But] if a man reserves a rent, and that if the rent be arrear, pl. 177. he shall forfeit so much by way of *nomine pœnæ*, the *nomine pœnæ* Mich. 13 shall not be forfeited without demand made. Mich. 10 Jac. B. R. Jac. S. C. per Curiam. Hobart's Reports 180. per Curiam, between * Howel resolved. — Brownl. 179. and Sandback. Hobart's Reports 113. between Sir † Richard Howell v. Grobbam and Thornborough, adjudged upon demurrer.]

S. C. & S. P.

† Hob. 82. pl. 108. Hill. 10 Jac. S. C. & S. P. — Brownl. 75. S. C. accordingly.

S. C. cited [4. [So] if a man grants a rent-charge to another, and for de- Palm. 490. fault of payment to forfeit a *nomine pœnæ*, no forfeiture shall be As of the *nomine pœnæ* without a demand at the day. Co. 7. Maund. to *nomine pœnæ*, see 28. b.] Tit. Rent. (D. b) to (L. b).

Per Cur. [5. If a man leases land for life or years, reserving a rent upon Obiter 5 condition, that if the lessee does not pay the rent at the day, without Rep. 40. b. any demand made by the lessor, that then it shall be lawful to the Paſch. 35 lessor to re-enter; In this case, by this special agreement of the parties, the lessor may enter for default of payment of the rent, without any demand. Co. 5. Dormer 40. b.] Eliz. B. R. in Dormer's case.

Mo. 87. [6. [But] if a man leases land for years, reserving a rent, with pl. 218. condition for non-payment to be void; In this case the lessor ought to Paſch. 10 demand the rent at the day of payment by the condition, or otherwise the lease is not void, though it be not paid by the lessee. Elis. Anon. Paſch. 1649. adjudged. Intratur. Hill. 24 Car. B. R. Rot. 312. Dyer held that debt does not lie; because after failure of payment the lessee is only tenant at sufferance; but between Dennis and Raffley, adjudged upon demurrer per Curiam, where an action of debt, for rent incurred after, was brought by the lessor against the lessee, and this matter pleaded, scilicet, non-payment of the rent at a day before, but no demand pleaded to be made by the lessor, and adjudged that the action lies.]

Weston e contra, that debt lies for all the time that the lessee continues in possession after; but Dyer said that there is a diversity between the cases. — Jo. 9. 10. pl. 9. Mich. 18 Jac. C. B. Hanson v. Norcliffe. Resolv'd, that the non-payment at the day does not make the lease void, and if the party would defeat the lease he ought to plead the demand, and so the defendant ought to have done in this case, whereupon judgment was given for the plaintiff in debt for the rent. — Hob. 331. pl. 411. S. C. and resolved that for want of the defendant's alleging a demand actually his plea was naught, and that so it is at the election of the lessor and his heirs to continue or avoid the lease in such case. — S. P. Arg. 2 Le. 141.

* Infra, pl. [7. [But] where a man leases to another, reserving a rent, and the 14. S. C. — lessee covenants to pay the rent at the days limited, he ought to pay it Error (R. b) without any demand, at his peril, in as much as he hath bound pl. 4. S. C. himself to pay it. Hill. 4 Jac. B. R. between * Fretville and Molineux, per Curiam. Mich. 7 Jac. B. between † Hare and Sir John Trial (A. g) Savill, adjudged. Paſch. 10 Jac. B. between † Manly and Jennings.] pl. 3. S. C. but S. P. does not appear in either of the said places. † Brownl. 179. S. C. but S. P. does not appear. — 2 Brownl. 273. S. P. does not appear. ‡ 2 Brownl. 176. S. C. argued, sed adjournatur.

[8. [So]

[8. [So] if a man leases land by indenture for years, reserving a rent payable at certain days at London, and the lessee in the same indenture covenants to pay the said rent at the days and place aforesaid, point there he ought to pay it by force of this covenant, without any demand of the lessor, otherwise he hath broke his covenants. * Pasch. 5 Jac. B. R. between Sir J. Spencer and Sir J. Paines, per Curiam.]

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ter opinion of the court was that debt lay not without a demand. — Bond for payment of rent reserved is not forfeited unless there be a demand of the rent upon the land. But if the bond be to pay the rent at a collateral place off the land, he ought to pay it at his peril without any demand; because he pays it in another nature than as rent; per Popham. Ow. 111. Pasch. 38 Elis. B. R. in case of Stroud v. Willis. — See Tit. Rent (F. b) pl. 1. S. C.

In covenant for non-payment of rent, the plaintiff in his declaration did not allege any demand; whereupon exception was taken thereto; but it was answer'd that the covenant was to pay such a sum for the rent expressly, and therefore well; but if the condition of a bond is for performance of covenants expressed in such a lease, one of which is for payment of rent, in that case the bond will not be forfeited without a demand; and of that opinion were the court. Vent. 259. Pasch. 26 Car. 2. B. R. Norton v. Harvy.

* [264]

[9. If a man leases for years, reserving a rent, with a clause of re-entry, and upon the making the lease the lessor lends him 200 l. stock, and the lessee covenants to pay the rent at the days and place; and after, by another covenant, covenants that if default of payment of the said rent be made at any of the days in which it ought to be paid, according to the effect, limitation, and true intent of these presents, then the lessee covenants to re-pay the said 200 l. Though there needs no demand of the rent to make the first covenant to be broke by non-payment, yet there ought to be a demand to intitle him to the 200 l. For this last covenant does not refer to the covenant before, but to the reservation; the words are (according to the limitation of the indenture) which is the reservation, and by these presents is intended the indenture, or the most notable part thereof, which is the reservation. Pasch. 5 Jac. B. R. between Sir J. Spencer and Sir J. Paines, by two against one.]

Goib. 154.
pl. 203.
S. C. and
the opinion
of the court
was, that
without a
demand of
the rent,
the action
of debt did
not lie for
the 200 l.
nomine
penne. —
S. C. cited
a Jo. 33.

[10. If a man leases land by indenture, reserving a rent, and the lessee binds himself by obligation, upon condition to perform all covenants, articles, agreements and payments in the indenture mentioned; in this case there ought to be a demand by the lessor to make the obligation to be forfeited. Pasch. 12 Jac. B. between Baker and Spaine. The same case Hobart's Reports 11 Hill. 2 Car. in Scaccario, between Chapman and Davison, per Curiam, upon a demurrer; but the court gave leave to the plaintiff to discontinue the suit, because that otherwise this would have been a perpetual bar of the obligation, if judgment should be given against him.]

* Hob. 8.
pl. 16. S. C.
adjudged for
the plaintiff,
And War-
burton J.
said that
S. P. was
resolved ac-
cordingly in
a former
case in this
court; but
that he is

not bound to seek the lessor, but to tender it only on the land; for he has bound himself to pay it, but still as a rent, and where the law will. — Brownl. 76. Baker v. Pain. S. C. & S. P. seems to be admitted. — So where the bond was to perform all the covenants and agreements contained in the deed, and lessor brings debt for non-payment of the rent, and the obligor pleads performance of all covenants and agreements; the lessor replies that the rent is behind, it was held no plea to say that the rent was never demanded, but he should have pleaded that he had performed all covenants and agreements, except the payment of the rent, and as to that, that he was always ready to have paid it, if any had come to demand it; but as to the first plea it was held not to be good; and as to the demand of the rent, the court was of opinion that it was to be demanded; for the payment of the rent is contained in the word (agreements) and not in the word (covenants); and then if he be not to perform the agreements in other manner than is contained in the deed of that agreement, the law saith, that the

shall be a demand of the rent; but if the lessee be particularly expressed by covenant to pay the rent, there he is bound to do it without any demand. Godb. 95, 96. pl. 108. Mich. 29 & 30 Eliz. C. B. Anon.

† Cro. C. 76, 77. pl. 7. S. C. in the Exchequer-chamber, and all the justices and barons held, that the judgment was well given; for the defendant pleading performance of the payments, covenants, and agreements, it shall be intended that he really performed them, and so had paid all the rents; and when the plaintiff replies, that he hath not paid such a rent, he needs not allege a demand, for the defendant may not say it was not demanded, for then it should be a departure from his plea, wherefore they held the replication was good, and yet the obligation being general for performance of covenants, doth not alter the nature of the rent, but that it ought to be demanded, and upon this reason a case was cited, which was Pasch. 40 Eliz. Rot. 106. betwixt Specot and Sheers, in C. B. and the judgment was affirmed. — Hutt. 90. S. C. adjudg'd for the plaintiff, but says, that the matter upon which the defendant justified, viz. whether the plaintiff ought to have demanded the rent, came not in question. — S. C. cited Palm. 400. — S. C. cited 2 Jo. 33. [265]

S. P. and held per Cur. that where there is an express covenant to pay the rent a demand in such case is not necessary as to the bringing debt on the bond. Cro. E. 332. pl. 11. Triq. 36 Eliz. B. R. Andrews v. Wood. — Godb. 95. pl. 108. Mich. 28 & 29 Eliz. at the end of the case. S. P. accordingly. — Godb. 337. pl. 432. Arg. cites as H. 6. 37. that the bond in such case is not forfeited unless the rent be first demanded.

Cro. C. 421. pl. 13. S. C. but S. P. does not appear. [13. [So] if A. leases land to B. by indenture for years reserving 20 l. rent per annum, payable at four feasts by equal portions, and after B. is bound in an obligation to A. upon condition that if he pays to A. for the rent of the said premises, the yearly rent of 20 l. for such term, (scilicet, the term demised) at four quarter days, according to the tenor and effect of one lease thereof made, bearing date with this obligation, and made between the said parties, according to the tenor and effect of the said lease, by equal and even portions, then the obligation shall be void. The lessee is not bound to pay the rent by this condition, without any demand of the lessor, because it refers to the indenture of lease, and that it shall be paid as a rent, according to the indenture. M. 21. Car. B. R. between *Horne* and

• Fol. 461.

• S. C. cited 2 Jo. 33.

and Barber, per Curiam, resolved; but this did not come materially in point of judgment.]

[14. If a man makes a writing sealed of a grant of a rent out of land, and after devises, that the grantee shall have the said rent according to the intent of the said writing; and that if his heir pays the said rent according to this will, then he shall have the disposition of the said land so long as he shall perform the will, and if his heir does not perform his will, then that his executors shall have the disposition of the land, to the intent that his will be performed; and if there be default in the heir that his will be not performed, and default in his executor that his will is not performed, then the land shall be to J. S. In this case, the grantee of the rent ought to demand the rent at the days of payment from the heir, and from the executor when it comes to him, otherwise J. S. shall have † nothing; for the will refers to the writing, and the clause of the executor is not that he shall pay the rent, but if there be default in him, &c. so that this is to be paid as a rent, and then it ought to be demanded. H. 4 Jac. B. R. between Fretzwell and Molineux, adjudged.]

Molineux, but that none of the exceptions taken in the principal case were taken in that case, wherefore † was adjudged for the plaintiff.

[15. If a man devises land to another, upon condition, that if he pays 4 l. yearly out of the land to the wife of the devisor for her life, adding over and above that his full intent and will was, that she should be yearly paid the said rent accordingly; the devisee ought to pay this rent to his wife, at his peril, without any demand of the wife, otherwise the condition is broke. D. 18. El. 348. 13.]

clearly e contra, and so was the opinion of Wray, and Saunders Ch. J. and Ch. B. in Praesentia Manwood ad Mensam, and they thought that there was no need for the feme to demand it at the land, but that it is payable by the devisees at their peril, if they will save the land. D. 343. a. b. pl. 11. S. C. ——— Ibid. Marg. says, that no judgment was given in this case, and that it seemed to several justices that the plaintiff should recover, the will being on a condition which was broken.

[16. If a man leases lands for years upon condition, that if the lessee does not pay yearly 40 s. at the feast of P. during the term * at D. it shall be lawful for the lessor to re-enter. In this case the lessee ought to pay it, at his peril, without any demand, because this is not suing out of any land, Co. Kidwellie and Brand, adjudged in effect.]

[17. If a man leases lands for years or life, rendering rent, and for non-payment within 40 days to forfeit a sum nomine poenae, he cannot recover the nomine poenae if he does not demand it at the day. Hobart's Reports 113. between Grobham and Thornborough adjudged.]

18. Where the king leases for years, rendering rent, with condition to re-enter for non-payment, the king is not bound to demand the rent as a common person is; per Hufley and Brian; for per Hufley, it ought to be found by office. Br. Prerogative, pl. 101. cites 2 H. 7. 8. U 4

19. In debt, a man was bound in 100*l.* to make such estate by such a day as the counsel of the obligee should devise; in this case the obligor need not tender the assurance nor make request, because the first matter is the devise which must come from the obligee. *Br. Conditions*, pl. 133. cites 6 H. 7. 4.

20. But where a man is bound to pay such a sum, or to make a feoffment, &c. there he ought to tender it without request. *Ibid.*

Litt. S. 345.
Co. Litt.
313. b.

21. A man makes a feoffment on condition that the feoffee, and his heirs, shall pay a rent to a stranger and his heirs, this is a good condition, yet such payment is not properly rent, because it issues not out of land, and an assise lies not for it; and yet if it be not paid the feoffor shall re-enter, and the feoffee ought to seek the stranger; for the payment is but of a sum in gross. *Hawk. Co. Litt.* 207.

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22. A. seised of lands in fee, covenants to infeoff J. S. thereof upon request, and after makes feoffment in fee to another of the same lands; J. S. shall have action of covenant without request. 5 *Rep.* 21. a. resolved, *Pasch.* 38 *Eliz.* B. R. in *Maine's case*.

23. A. conveyed lands to J. S. in tail male; upon condition that J. S. and the heirs male of his body, pay to the daughter of A. 200*l.* or so much thereof as shall be unpaid at the death of A. according to the intent of his last will. Afterwards A. by will makes the said J. S. his executor, and devises to his daughter 200*l.* viz. 100*l.* to be paid that day twelve-month next after his death, and the other 100*l.* that day twelve-month next after, &c. and dies. J. S. is not bound to pay the 200*l.* without demand, for the payment is referred by the indenture to be according to the will, and the 200*l.* was devised as a legacy, which ought to be paid but upon demand, and not at the peril of the executor, and therefore the nature of the payment is altered by the intent of the will, and so being not demanded, the non-payment shall not prejudice the tenant in tail of his land if it had been a condition, for then it should be but a condition to be paid according to the nature of a legacy upon demand, and not at the peril of the party. The opinion of three judges was certified to the chancellor accordingly. *Poph.* 102, *Hill.* 38 *Eliz.* *Slaning's case*.

24. Covenant to stand seised to the use of himself for life, and after to his wife for life, so long as she should be effectually ready to demise it to his heir at 50*l.* rent, when she should not dwell on it herself, and for so long as she should not dwell on it. The husband died, and the wife married, and did not live upon it, yet she need not make any demise unless the heir demands it. *Mo.* 626. pl. 860. *Mich.* 43 & 44 *Eliz.* *Sir Cha. Rawleigh's case*.

25. A copyholder in fee of lands in burrough English had issue three sons, B. C. and D. and surrendered it to the use of his will, by which he devised it to C. in fee, upon condition he to pay to his 4 daughters 20*l.* a-piece at their full age, and dies. B. had issue two daughters, and dies. C. is admitted, and does not pay the said sums to the daughters at their full age. It was held by all the justices, besides *Williams*, that it is a condition, but that it was not broken without

without a demand of those sums after their full age, for he is *not bound of himself to take notice of their age*, but after notice ought to pay it. Cro. J. 57. pl. 2. Hill. 2 Jac. B. R. *Curtis v. Wolverston*.

26. A. covenanted with B. *to procure a deputation at 2 years end* for B. for 7 years, in the same manner as J. S. had it; A. is bound to procure it at his peril, and such an one as J. S. had, without being shewn by B. how that was. Cro. J. 297. pl. 4. Hill. 9 Jac. B. R. *Barwick v. Gibson*.

27. In assumpsit, &c. the plaintiff declared, that the defendant, in consideration that the plaintiff had paid him so much money, promised *to join in him with the surrender of certain copyhold lands*. It was objected, that the plaintiff should have shewn that he requested the defendant to join with him in the surrender, for it was not a single act to be done by the defendant alone, but he was to join in the act with another, and Roll Ch. J. held accordingly; and judgment against the plaintiff. Sty. 107. Trin. 24 Car. B. R. *Freeborn v. Purchase*, All. 68. *Freeborne v. Pintras, S.C. resolv'd by Roll that the declaration was insufficient, because he did not allege that he gave notice*

to the defendant that he was ready to join with him.

28. On an action brought on a charter-party, Hale Ch. J. said, that *upon a penalty* you need not make a demand, *as in case of a nomine poenae*; as if I bind myself to pay 20 l. on such a day, and in default thereof to pay 40 l. the 40 l. must be paid without any demand. Mod. 89. pl. 52. Mich. 22 Car. 2. B. R. *Bradcat v. Tower*.

29. *Covenant by baron and feme to make assurance on request within 7 years*. The feme dies within 7 years, *no request being made* and the heir of the feme (whose the estate was) was an infant; per Cur. the covenant is not broke, for it was the plaintiff's fault not to demand the assurance in the life of the wife, it appearing by the verdict that she was of age before she died, and so the breach is not well assigned. 2 Jo. 196. Pasch. 32 Car. 2. B. R. *Nash v. Aston*. [268] *Skin. 42. pl. 13. S.C. and held, that if she was above age at her death it is no breach.*

30. Where the condition of a bond is *to pay such sums as shall become due for such and such things*, no demand is necessary, the money becoming due being as a *sum in gross*; per Holt Ch. J. *Ld. Raym. Rep. 596. Trin. 12 W. 3. Levins v. Randolph*. This was on a bond given to the Society of Gray's Inn by a member for payment of

commons and other dues to the house.

31. *After pleading general performance*, the defendant is *stopp'd to say that there was no demand*; per Gould. Ch. J. to which Holt Ch. J. agreed. *Ld. Raym. Rep. 596. Trin. 12 W. 3. in case of Levins v. Randolph*.

32. *Where the thing in its nature requires a demand, a bond for doing thereof is not forfeited till demand*; and in that case the defendant must take advantage of the want of demand by pleading that he was always, and still is, ready to pay it; for if he plead performance generally, and plaintiff assigns a breach in his replication, the defendant shall not rejoin and allege want of demand, for that would be a departure; per Gould J. *quod Holt concessit. 12 Mod. 414. Trin. 12 W. 3. Levins v. Randall*.

(A. d) What

See notice
(A) (A. 2)
(A. 3).

(A. d) What Thing will excuse the Performance of the Condition.

In what Cases he who is to have the Benefit ought to do the first Act, scilicet, by giving Notice.

[And who must do the first Act, pl. 29, &c.]

S. P. where the promise was in consideration of a horse given to the defendant, he promised to pay the

[1. IF a man in consideration that J. S. will deliver a horse to a stranger, promises to pay to J. S. 5 l. cum inde requisitus esset, J. S. need not give notice to him of the delivery of the horse, but he ought to take notice thereof at his peril; for he ought to pay it upon request. P. 5 Jac. B. R. between Pamfret and Shadd, per Yelverton.]

plaintiff 20 l. on his return from London to G. and alleged the time of his return, but because no notice was alleged to be given of his return, it was adjudged that the action was not maintainable. Arg. Roll. Rep. 314. cites Mich. 6. Jac. Mouse v. Gardiner.

Roll. Rep. 355. pl. 7. S. C. but S. P. does not appear. Roll. Rep. 433. pl. 29. S. C. accordingly, and upon view of pre-

[2. If the condition of an obligation be to pay 10 l. to the obligee at the day of the marriage of the obligee, the obligee is not bound to give notice to the obligor before his marriage at what day he will be married, but the obligor ought to take notice thereof at his peril, in as much as he hath taken upon him to pay it at the day. My Reports, 14 J. between Beresford and Goodrouse, per Dodridge and Houghton, adjudged, for this becomes a debt by the marriage.]

cedents judgment was given for the plaintiff by the assent of the court. Cro. J. 404. pl. 3. Beresford v. Woodroff, S. C. and exception being taken, because the notice was not given, it was overruled by reason of a precedent shewn of a judgment in B. R. Trin. 44 Eliz. * Hodges v. Wanley, and adjudg'd for the plaintiff, and affirm'd in error; and so it was in the principal case. 3 Bull. 235. * Beresford v. Goodrouse, S. C. adjudg'd and affirm'd in Com. Seacc. Hutt. 80. Pasch. 2 Car. Crane v. Crampton, S. P. adjudg'd accordingly by 3 justices, but Croke J. seem'd to be of a contrary opinion. Cro. C. 34. pl. 8. S. C. adjudg'd accordingly. See Actions (A. 2, 7) pl. 8. S. C.

See Infra (C. d) pl. 2.

* Roll. Rep. 434. cites Hodges v. Wanley, S. C. & S. P. as Trin. 14 Eliz. 3 Bull. 236. cites S. C. as adjudg'd Trin. 44 Eliz. Yelv. 168. cites S. C.

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[3. [So: if a man promises to J. S. in consideration that he will marry A. W. his cousin, to pay 10 l. to him at the day of his marriage; J. S. need not give notice to him who made the promise before he marries with A. W. at what day he will marry her, but he ought to take notice thereof at his peril, in as much as he hath taken upon himself to pay it at the day, though the marriage is to be had by J. S. himself. My Reports 14 Ja. between * Beresford and Goodrouse, adjudged; for it becomes a debt by the marriage, Contra, T. 4 Jac. B. R. between * Wheeler and Street, adjudged.]

Tit. Ac-

tions (R)

pl. 2. & the

notes there. * Yelv. 122. S. G. cited in the case of Ash v. Doughty, that notice ought to have been given; but that case was afterwards denied per tot. Cur. Yelv. 168. Mich. 7. Jac. B. R. in case of Brenley v. Todd, where it was held, that notice was not necessary, and that its being by promise is as strong as if it was by bond; and judgment for the plaintiff. Cro. J. 228. pl. 4. Bradley v. Toder, S. C. adjudged for the plaintiff. 1007 135. Brumley v. Todd S. C. adjudged. 3 Bull. 329. 327. Hill. 1 Car. B. R. Alfrey v. Blackamore, adjudged accordingly per tot. Cur. And ibid. Fitzham serjeant informed the court, that he had the same day moved the court of C. B. in the like case,

fact, and that it was adjudged there per tot. Cur. clearly that no notice was to be given. — Lat. 37. Affright v. Blackmore, 3. C. but I do not observe any opinion of the court.

[4. So a fortiori, if a man promises to pay 10 l. to J. S. at the day of the marriage of W. N. for there the marriage is not to be had by him to whom the promise is made. My Reports, 14 Ja. per Curiam.] See pl. 2. & the notes. See (B. d) pl. 5. S. P.

[5. If J. S. sues an action against J. D. and J. N. comes to J. S. and promises him, that if he will surcease his suit against J. D. that he himself will pay him all the charges, &c. of the said suit, when he, scilicet, J. S. comes into Somersetshire. If J. S. surceases his suit, and after comes into Somersetshire, J. N. is bound to perform his promise, without any notice given of the coming of J. S. into Somersetshire, because this was a duty by his coming there. My Reports, 13 Jac. * Richardson's case, adjudged. Vide Hobart's Reports 93. between † Richards and Carviniell, it seems this was the same case, but there the opinion is contra.] * 3. C. cited as ruled good for the same reason. Roll. 314. Arg. — See (C. 8) pl. 6. S. C. — † Hob. 68. pl. 74. 8. C. Hill. 12 Jac. it was moved in arrest of judgment, that the plaintiff should have given notice of his first coming into Somersetshire, because it lay best in his own notice, and also because the defendant undertook not the payment by bond, but by assumpsit only; and to this opinion Warburton agreed. — Brownl. 10, 11. 5. C. and though he did not allege that he gave notice of his coming, yet judgment was given for him. — But Bull. 44. Mich. 8 Jac. Gable v. Mosse, where the promise was to pay money on the plaintiff's coming from London; Yelverton J. held, that notice ought to have been given by the plaintiff of the time of his return, and took this diversity, when it rests upon a matter to be done between the parties themselves, there notice is to be given of this to the party, who is to make the payment upon an act to be done by the other to whom the payment is to be made, otherwise where it is to be done by a stranger, for there he hath assumed upon himself to take notice, and so there at his peril he ought so to do, and so it hath been formerly adjudged upon this difference, and so in this case the act to be done before payment of the money being to be done by the party himself, to whom the money is by promise to be paid, he is himself to give notice of the time of the performance of this act by him to the party that is to pay the money, before he is to pay the same; and there being no notice of this laid in the declaration, as the same ought to have been, for this cause the declaration is not good, and this is a good error; and consequently the judgment for this cause is erroneous and to be reversed. Toti Curia clear of opinion, that this is a good error, for that notice ought to have been given of the time of his return from London, and this ought to have been laid in the declaration; and so for this omission the declaration is not good, and the judgment for this cause erroneous, and for this error judgment was reversed by the rule of the whole court. — See Freem. Rep. 254. pl. 270. S. P. by Baldwyn.

[6. If A. says to B, that if he will sell certain great cattle to C. for such sum as shall be agreed between them, if C. does not pay him the sum according to the agreement, he himself will pay it; and B. sells the cattle to E. for 20 l. to be paid at a day to come, and C. does not pay the 20 l. at the day; A. is bound to pay it at his peril, without any notice given to him by B. for how much he sells them; or what time, because he hath taken upon himself to pay it at his peril. Mich. 15 Ja. B. R. between Pollington and Lingham, adjudged, this matter being moved in arrest of judgment.] [270]

[7. If A. sells lands to B. by the name of 20 acres, according to the rate of 200 l. for every acre, and it is agreed between the parties that the land shall be measured by J. S. before the 1st of January next ensuing, and A. covenants to repay according to that rate for every acre before the 1st of May after, if there be not 20 acres upon the measure; if J. S. measures it, and it is found there are not 20 acres, A. ought to repay it before May at his peril, without any notice given how many acres it wants of 20, for he hath taken upon himself

Roll Rep. 257. pl. 25. Hixt v. Goab, 5. C. but not exactly S. P. — Ibid. 314. pl. 25. 8. C. and by Coke, Doderidge,

and Haughton, no notice need be given, because he is privy to the covenant, and for this point judgment was given for the plaintiff. — Godb. 197. pl. 284. S. C. but S. P. does not appear. — Cro. J. 390. pl. 4. S. C. ruled, that being privy to the covenant, he ought to take notice as well as the plaintiff; and in point of covenant notice is not to be given so strictly as it is upon an obligation, which is in point of forfeiture; and afterwards, notwithstanding the exceptions, judgment was affirmed. — 4 Le. 242. pl. 404. S. C. but S. P. does not appear. — Jenk. 337. pl. 83. S. C. & S. P. adjudg'd and affirmed in error. — See (C. d) pl. 7. 8. S. C. — S. P. where the covenant was, that if upon measuring it did not amount to so many acres of wood, he would make it up so out of the woods adjoining. The woods did not hold measure. The court held notice not necessary, because the defendant had taken upon himself by covenant to make it up, and he might measure it as well as the plaintiff. — Freem. Rep. 254. pl. 270. Pasch. 1678. Clarke v. Child.

[8. So in this case, if by the agreement no certain persons had been appointed to measure it, but that it should be measured by one elected by one of the parties, and by another elected by the other, if the vendee elects J. S. and gives notice thereof to the other, and of a certain time to measure it, and J. S. does it at the day, and none comes for the other to join with him, yet he ought to take notice, at his peril, how many acres it wants of 20, otherwise an action of covenant lies; for now, by the matter subsequent, and the default of the vendor, it is as much as if J. S. had been appointed at the beginning to have measured it. My Reports, 13 Jac. between Goats and Sir Baptist Hixt, adjudged.]

Fitzh. Arbitrement, pl. 15. cites S. C. — Br. Arbitrement, pl. 37. cites S. C.

[9. If the condition of an obligation be to account before such auditors as the obligee will assign, and the obligee assigns auditors, he ought to give notice thereof to the obligor, otherwise he is not bound to account. 8 Ed. 4. 1. b. per Fairfax.]

— Br. Notice, pl. 18. cites S. C. — S. C. cited 8 Rep. 92. b. ad finem, per Cur. and called a sudden opinion, and says it was held per Cur. in 18 E. 4. fol. [19] a. & 24. a. that the plea was insufficient, because he had bound himself to it, and taken upon himself to take notice at his peril, and there Brian, Vavasor, and Catesby J. agreed, that in the said case of arbitrement the obligor ought to take notice at his peril, and so they said it was adjudg'd in the same king's time in B. R. and in Francis's case the court said, that so the law is without question.

[10. If I am bound to infeoff such persons as the obligee shall name, he ought to give notice of those which he names, otherwise I am not bound to infeoff them. 8 Ed. 4. Arbitrement, 15. per Billing.]

[11. If the condition be to seal such obligation as an escrow as the obligee shall write, he is not bound to seal it without notice of the escrow written.]

A man is bound to pay 100 l. two months after A. returns from Rome, he ought to give notice of his return before

[12. If the condition of an obligation be, that if the obligee returns from beyond the seas before the 22d of April next, then if the obligor pays unto him at Easter following 100 l. the obligation shall be void. If the obligee returns within the time, he is not bound to give notice thereof to the obligor, but he ought to take notice thereof at his peril, for he hath bound himself to this inconvenience. Mich. 37, 38. Eliz. B. R. between Eue and Dautry, per Curiam.]

that he can have an action upon this obligation, for he may land at Newcastle or Plymouth, where by common intendment the obligor cannot know whether he be returned or not; per Doderidge J. and this was agreed by the Ch. J. and Jones. Foph. 164. Pasch. 2 Car. B. R. in case of Hodges v. Moore.

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[13. If

[13. If the condition of an obligation be to pay 20 l. within 10 days after J. S. hath rode five times in six days from London to York, and from York to London; he ought to take notice of the doing thereof at his peril, because it is to be done by a stranger. Mich. 4 Jac. B. R. between *Herby and Pope*, dubitatur.]

Cro. J. 137. pl. 14. Normanville v. Pope S. C. After verdict it was moved, that this

bill obligatory is not payable but at 10 days after notice of his going and returning, and that licet scilicet requisitus would not serve. Popham said the bar was not good; et adjournatur. Ibid. 250. pl. 10. S. C. and Tanfield held, that as this case is there needed no notice, because the act is to be done by a stranger, and his time of return lies as well in the notice of the obligor as the obligee; wherefore the obligor is at his peril to take notice thereof; but the other justices doubted thereof, and judgment was given upon another point. See (D. d) pl. 2. and the note there.

[14. [So] if the condition of an obligation be to pay 20 l. to B. the obligee, within one year after B. shall marry C. In this case he is bound to pay it to B. within one year after the marriage, without any notice given of the marriage by B. for he hath taken upon himself to pay it within a year; and he may take notice of the marriage of C. who is a stranger to the condition. Trin. 1651. between *Shepherd and Frie*; and in another action between *Shepherd and Latch*, adjudged upon demurrer.]

See pl. 3. & the notes there. See (D. d) pl. 5. and the notes there.

[15. [But] if A. sells to B. certain weys of barley, or other things, and B. assumes to pay for every wey as much as he sells a wey for to any other man, if he after sells to others certain weys for a certain sum, he shall not have an action upon the case against B. upon his promise, till he hath given him notice for how much he sold the wey to others; for B. is not bound to pay it till notice, because it is uncertain, and not known to him, and here he assumes in general, and not in particular, scilicet, to pay so much as J. S. shall pay for a wey, and so he does not assume to take notice at his peril. My Reports, 13 Jac. between * *Haule and Hemyng* adjudged.

* Roll. Rep. 285. pl. 2. S. C. adjudged against the plaintiff. Cro. J. 432. pl. 18. Henning's case, S. C. adjudged accordingly. 3 Bull. 85. Hall v. Hemmings S. C. adjudged per

between † *Homes and Twisse*, in camera scaccarii adjudged in a writ of error, the same case. Hobart's Reports 70.]

tot. Cur. clearly for the defendant. † Hob. 51. pl. 57. *Hulmes v. Twiss*, S. C. which was, that H. sold to T. a ton of wood, [wood] to be paid for in 6 months, after the rate that he should sell the rest, and alleged, that he sold a ton to C. at the rate of 23 l. a ton; and adjudged in B. R. for the plaintiff, but reversed in Cam. Scacc. for want of alleging notice to the defendant of the sale and price, being a thing of his private knowledge; and Holart f.y.s. that some judges of B. R. allowed of the judgment. Jenk. 294. pl. 43. S. C. adjudged by the judges of both benches. S. C. cited per Cur. Cro. J. 432. in pl. 12. Roll. Rep. 285. pl. 2. S. C. cited Arg. S. C. cited Arg. 3. Bull. 86. Jenk. 311. pl. 92. S. C.

[16. But if he had assumed to pay as much for every wey as he sold a wey for to J. S. if J. S. after bought a wey for a certain sum, he ought to take notice thereof at his peril, without any notice given, otherwise he hath broke his promise. Mich. 15 Jac. B. R. between *Pollington and Lingham*, per Curiam.]

S. P. per Cur. Cro. J. 432. pl. 12. Trin. 15 Jac. B. R. in Henning's case, obiter.

[17. If A. is indebted to B. by obligation in 60 l. for the payment of 30 l. and thereupon, in consideration that B. will mutuo dare to C. a stranger upon request, so much as will make it 100 l. and will accept C. and D. to be bound to B. for the payment of the 100 l. and will deliver up the said obligation of 60 l. A. assumes to B. that the said 100 l. with interest, shall be paid as certainly as any money in England. In an action upon the case by B. he is not bound to allege

[2;2] more,

more, but that he lent the 70*l.* to make the 30*l.* 100*l.* to C, without averring that he gave notice thereof to A. for the reason aforesaid. Trin. 22 Car. B. R. adjudged. Intratur P. 22 Car. Regis.]

S. P. by Shuttleworth, Le. 305. in pl. 141.—See (P. a) pl. 10. and the notes there.

[18. If A. covenants with B. to make such assurance to him of the manor of D. as the counsel of B. shall devise before such a day, and after the counsel devises an assurance, B. ought to give notice thereof to A. otherwise he is not bound to perform it. Pasch. 42 Eliz. B. R. per Gawdy.]

S. P. by Shuttleworth, Le. 305. in pl. 141.—See (P. a) pl. 10. and the notes there.

[19. But if A. covenants to make such assurance as the counsel of A. himself shall devise, then if his counsel devises, he ought to perform it without notice given by B. Pasch. 42 Eliz. B. R. per Gaudy.]

Exa. C. 132. pl. 7. Juxon v. Thornhill, S. C. the plaintiff did not allege that he gave notice of the Ld. Manchester's order, yet he alleged that he required the sum according to the said order, which

[20. If in an action upon the case upon a promise the plaintiff declares, that the defendant promised to pay so much for his passage over certain locks in a river made by the plaintiff in his own soil, as the lord of Manchester thereafter should appoint to be paid for the passage of every boat, and alleges, that the lord of Manchester after appointed so much in certain to be paid, &c. and that he requested the defendant such a day to pay it, this is a good declaration, without alleging that he gave any notice to the defendant of the appointment of the sum made by the lord Manchester, because the plaintiff is as great a stranger thereto as the defendant, and it does not lie more in his conscience than in the conscience of the defendant, this being to be appointed by a stranger. Mich. 4 Car. B. R. between Jackson and Thornell.]

As an implied notice; whereupon it was adjudged for the plaintiff nisi.

Exa. E. 834. pl. 5. East v. Thoroughgood, S. C. and held that he ought to take notice of the dislike, because he bought himself thereto by his express promise.

[21. If A. bargains with B. for certain land for 100*l.* in this manner, *scilicet*, he gives him 20*l.* presently, and says further, if he likes the land and assurance, that then this 20*l.* shall be in part of payment of the 100*l.* but if he does not like it, that then he shall have back his money again, and after he dislikes the bargain, he may have an action of debt for the 20*l.* before any notice given to B. of his dislike, for he ought to take notice thereof at his peril. Trin. 43 Eliz. B. R. between Thoroughgood and East adjudged.]

Roll. Rep. 112. pl. 23. S. C. and judgment affirmed notwithstanding this and several other exceptions.—3 Bull. 152, 153. S. C. and judgment affirmed.—Jenk. 324. pl. 39. S. C.

[22. If a man assumes to J. S. to deliver to him *apud Barton Haven* on ship-board 20 quarters of barley, although J. S. ought to bring a ship there to receive the barley, yet he need not give notice to him that he hath brought it there, for he ought to take notice thereof himself. M. 13 Jac. B. R. between Atkinson and Buckle adjudged.]

Condition.

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[23. If *A.* affirms to *B.* in consideration that *B.* will deliver to *D.* certain wood to the use of *A.* that he will pay so much, &c. for every load to *B.* upon request; in an action upon the case, if he alleges that he delivered so much, &c. to *D.* to the use of *A.* and that he after required *A.* to pay so much for every load, &c. this is good, without alleging any notice given to *A.* when he delivered the wood to his use to *D.* for he ought to take notice thereof at his peril, though the time of the delivery is uncertain. P. 9 Car. B. R. between *Jewel and Pampoe*, per Curiam adjudged.] [273]

[24. If a condition of an obligation be to perform an award, Roll. Tit. and the arbitrator awards, that one shall make a general release of all things till the date of the obligation, it is not an excuse to him to say, that he was at all times ready to make such general release, but the other never requested him to do it. Mich. 14 Car. B. R. between *Rily and Hillman* adjudged upon demurrer. Intratur Mich. 13 Car. Rot. 187.]

sey. See Tit. Arbitrament (F. a) (O. a) per totum.

[25. After a marriage by *C.* with *D.* the daughter of *A.* *B.* the father of *C.* in consideration that *A.* will give 50 l. to *C.* for the better maintenance of *C.* and *D.* and at the request of *B.* *B.* promises *A.* to pay 100 l. to *D.* the daughter of *A.* if she survives *C.* her husband. In an action upon the case by the administrator of *A.* against *B.* after the death of *C.* it is a good declaration to aver, that *A.* paid the 50 l. to *C.* in his life, and yet the defendant *B.* did not pay the 100 l. to *D.* who survived *C.* without averring any notice given of the payment of the 50 l. by *A.* to *C.* for he hath taken it on himself to pay it at his peril. Mich. 22 Car. B. R. between *Playfield and Collard* adjudged, this being moved in arrest of judgment. Intratur Trin. 22 Car. Rot. 673.]

Hardr. 42. Arg. citat S. C. held per Curiam according to All. 2. — See Actions (Z.) pl. 6.
S. C. but not S. P.

[26. If a man promises another at another time, upon request, to make to him a good and sufficient assurance of certain lands for seven years, he ought, upon request, to make a lease for the years, without any tender of a lease by him to whom the promise is made, for he ought to make a good lease at his peril; for here the request does not refer to the manner of the conveyance to be made, but only to the time when the lease shall be made. Trin. 15 Jac. B. R. between *Rowland and Courtman* adjudged.]

[27. If the condition of an obligation be, that whereas the obligor is lessee for years from the obligee of certain lands, if he renders up the possession of the land, at the end of the term, to the lessor, his heirs or assigns, upon request, then the obligation shall be void, &c. and after the lessor assigns over his reversion, and the assignee at the end of the term requests him to render up the possession to him, he is bound to do it, without any notice given him that he is assignee, for he ought to take notice thereof at his peril, in as much as he hath bound himself to tender it up to the assignee. Pasch. 16 Jac. B. R. between *Lingben and Pain* adjudged.]

[28. If

Brown 23. S. C. but not very clearly reported.—
Hob. 12. pl. 24. S. C. but S. P. does not appear.
 [28. If a man leases a mill for years, and the lessee covenants to repair the mill, and the lessor covenants to find him great timber for it, the lessee ought to give notice to the lessor, how much will suffice for the reparation, and not to demand in general timber for reparations, or otherwise the lessor is not bound to deliver any. *Trin.* 12 Jac. B. between *Holder and Taylor*, per Curiam.]

G. having a Fl. Fa. against the goods of L. assumed to the sheriff that he would enter into the bond to them when required, to save them harmless if they would enter into such a shop, and take execution of the goods there. In assumpsit the plaintiffs declared that licet sapius requisitus, G. had not entered into bond. Exception was taken that he did not shew by whom the request was made; and likewise for that he did not shew that he tendered a bond to them, for that he being to enter into bond upon request, he that would have the bond ought to make it ready, and to require it, &c. sed non allocatur. And notwithstanding these and other exceptions, judgment was given for the plaintiff. *Cro. J.* 652. pl. 21. *Mich.* 20 Jac. B. R. *Arundel v. Gardiner*.

A. covenanted that if B. should pay 60 l. for which C. stood bound, that then B. should have and enjoy a grant of the said C. of a moiety of such and such goods. B. paid the money, but exception was taken because he did not shew that he requested the moiety of the goods, and tendered a writing to him to seal, for that he being the party who is to have the benefit thereof ought to make the tender; and for this and other causes a judgment in C. B. was reversed. *Cro. J.* 660. pl. 10. *Hill* 20 Jac. B. R. *Archer v. Dalby*.—*Palm.* 278. S. C. but S. P. does not appear.

* [274]

Hob. 69. pl. 80. S. C. and S. P. held accordingly.—
Ibid. 77. pl. 98. S. C. adjudged against the plaintiff.—
Brownl. 12. S. C. but S. P. does not appear.
 [30. If the plaintiff in an action upon the case declares, that in consideration that he would become bound to the defendant, by obligation, for the payment of 11 l. at a day, the defendant assumed to deliver an horse to the plaintiff; and the plaintiff avers, that he offered to be bound to the defendant, &c. and did not say the obligation was sealed, and that he offered to deliver it so sealed, as he ought; this is not good, for he ought to do it of his part. *Hobart's Reports* 25, 105. between *Austen and Gervais*.]

[31. If A. being a bailiff of the Borough-court of Westminster, in consideration of 10 l. given to him by B. promises B. to arrest J. S. at the suit of B. by process out of the said Borough-court. In an action upon the case upon this promise, it is a good plea for A. to say, that he was always ready after the said promise to arrest J. S. at the suit of B. if he had brought to him any sufficient warrant to do it; but says B. never brought him any process out of the said court to arrest him; this is a good plea, because it belonged to B. to sue out the process, for it will be maintenance in A. to do it, and the law (where the words are general) will so marshal them, that he ought to do it for whom it is most proper. *Trin.* 7 Car. B. R. between *Davis and Ridgeway* adjudged upon a demurrer.]

Fitch. Dett. pl. 87. cites S. C.—
Br. Condi- tions, p. 72.
 [32. If the condition of the obligation be, that the great bell of Mildenhall shall be carried to the house of the obligor, in W. at the costs of the men of Mildenhall, and there shall be weighed, and put in the fire in praesentia hominum de Mildenhall, and then the obligor shall thereof make

make a tenor, to agree in tono and sono to the other bells of Mildenhall; 9 E. 4. in this case the obligor ought to weigh and put it in the fire; for he 3. S. C. and ought to do it to whose occupation it properly belongs to do it; which 2. P. accordingly. For where it is not put in *is the defendant, who ought to make the bell.* 9 Ed. 4. 3. b.]

certain who ought to make the thing, then it shall be intended that he who has the best skill in it shall make it, to whose occupation it belongs, which is the bell-founder, which is the defendant. And per Choke, because it is that it shall be weighed in presentia hominum de M. therefore the men of M. shall weigh it. Per Nedham and Pigot, the defendant is not bound to make the bell till it be weighed, and the plaintiff has as good skill to weigh it as the defendant, and he that would have the advantage of the obligation shall make it in his own dispatch; and Dunby J. was against the defendant. — So where a than is bound to a taylor, that if he brings 3 ells of cloth which shall be shaped, and that if he makes him a coat of it, that then he shall pay to him 10 s. there the taylor shall shape the cloth, per Jenney, which Choke, Littleton; and Moile, J. agreed. Ibid.

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[33. If A. binds himself to B. to deliver to B. a certain quantity of hops, well pick'd and condition'd, and that B. shall have the choice of these hops, out of 204 bags of hops of A. of his own growth. In this case B. ought to do the first act, scilicet, he ought to require A. to shew him to view his 204 bags, out of which B. shall have his election; for otherwise B. cannot make any election without view of the 204 bags which are in the custody of A. himself, and A. cannot deliver them before election. Tr. 14 Car. B. R. between * Brooke and Boote, plaintiffs, and Woodward, defendant, per Curiam, upon demurrer, but judgment given against the plaintiff for a fault in his declaration. Mich. 15 Car. B. R. between the same parties, in a new action brought upon the same deed, and thereupon a demurrer, and the court of the same opinion, but the demurrer waved by consent, and issue taken. Intratur Tr. 15 Car. Rotul. 434.]

Fol. 436.

* Niar. 74. pl. 113.

S. C. the

court

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clined that

B. ought to

do the first

act, viz. to

request A.

to shew the

bags, and

advised the

plaintiff to

wave the

demurrer

and plead de novo, which they did. — In consideration of the goods of the value of 40 l. delivered by P. to C. the defendant C. promised to deliver to P. so many pipes of sack, then lying in the cellar of J. S. in London, as should be of value of the said goods per praefatum P. querentem eligenda and avowed that at Norwich he required the defendant deliverare vinum praedictum to the plaintiff ad eligendum so many pipes as should be of the value of the said goods, &c. It was admitted that a request ought to be made, and resolved that the request was well made; for the plaintiff must make it when he can meet with the defendant, and thereupon the defendant ought to appoint a reasonable time, when he will be ready to go with the plaintiff to the cellar to make his election, and that the request was well as to the manner, for he has perform'd the agreement directly, which was to deliver them to the plaintiff to be chosen, and is all one as requiring him to perform his promise, which must be by shewing the plaintiff the wine in his cellar, that he might make his choice, which must be by tasting the wine before he need make his election; and upon good debate, the plaintiff had his judgment. Allen. 25. Trim. 25 Car. B. R. Parmenter v. Cresity — Sty. 49. 8. C. says, the court held that a special request ought to be made to deliver the wines, because it is upon a contract, and that afterwards judgment was given quod querens nil capiat per Billam.

[34. If a man covenants to make further assurance at all time and times, at the charge of the covenantee, and the covenantee demands a fine after for further assurance, the covenantor is not bound to levy it, if he does not appoint a certain day when he will have it levied. H. 37 El. B. per Curiam.]

[35. If a man promises to make such assurance of such lands as he hath by copy to another, before such a day as his council learned shall advise; if he tenders an assurance to him without any advice of his counsel, yet he who made the promise is bound to seal it, otherwise he hath forfeited the assumpsit. P. 38. El. B. R. between Clifton and Gibbon adjudged.]

Cro. E. 465.

466 (bis.)

pl. 2. S. C.

adjudge: for

the plaintiff;

for the hav-

ing of coun-

sel is only

for the strengthening of his assurance, and if the plaintiff at his own peril will inquire of it himself, the defendant ought to do it as he requires, and judgment accordingly.——See (P. a) *supra*, pl. 31. *Moor v. Roswell* e contra, and the notes there.

[16. In an action upon an assumpsit, if the plaintiff declares, that *whereas he, at the request of the defendant, had delivered to the defendant so much old lay-metal, to be artificially made by the defendant into pewter vessels, capiendo inde of the plaintiff tantum quantum for his labour he shall reasonably deserve; in consideratione inde the defendant after, scilicet, the same day, assumed to deliver to the said plaintiff, lay-metal artificially made into pewter, when he should be requested; and avers, that although the defendant was requested to deliver the said old lay-metal made into pewter vessels, yet he had not delivered it, &c.* and the defendant pleads non assumpsit, and it is found for the plaintiff. Though it is *not averred, that he tendered to the defendant so much as he deserved for the making thereof into pewter vessels*, yet the declaration is good, for *this is not a precedent condition; but the words capiendo proinde, &c. is but to shew the contract between them, upon which he may have an action of debt*, though the defendant may retain the goods till he had paid as much as he deserves, and that he was ready to deliver it upon payment thereof; for this ought to come properly of his part, in as much as it does not lie in the conscience of the plaintiff how much he deserves, without shewing thereof by the defendant; and also it is at the election of the defendant, either to bring his action for what he deserves, or retain the goods till payment, and therefore it ought to come of his part; and here the defendant does not rely upon it, but pleads non assumpsit. P. 1649. between *Brocklesby and Brocklesby* adjudged in B. R. in a writ of error upon such a judgment in banco, and the judgment affirmed accordingly. Intratur Mich. 20 Car. Rot. 73.]

[37. If *A. covenants with B. to surrender a copyhold, which he hath for life, to the use of B. who hath the reversion thereof upon request made by B. to A. and after B. tenders to A. a letter of attorney in writing, by which he gives power to two attorneys to surrender for him, at the next court of the manor, to the use of B. and this course is warrantable by the custom of the manor.* In this case, upon this tender and request to seal, A. is * not bound to seal the letter of attorney, nor to surrender in court or otherways; for A. hath taken upon him to surrender upon request; so that it is at the election of A. whether he will surrender in court or by letter of attorney, or any other ways that he may; and this election cannot be taken away by B. and therefore when B. does not require him to surrender, but only to seal a letter of attorney, this is a void request, and as no request, and therefore B. [*A.*] is not bound to seal the letter of attorney, nor to surrender in court, or otherwise, upon this request. Pasch. 9 Car. B. R. between *Simms and Walker*, plaintiffs, and *Dame Smith*, defendant, adjudged upon a demurrer. Intratur Hill. 6. Car. Rot. I being of the counsel for the defendant.]

Cro. C. 176.
pl 23. Mich.
5 Car. B. R.
the S. C.
but S. P.
does not
clearly ap-

• Fol. 467.

pear.——
Ibid. 259,
300. pl. 1.
S. C. re-
solved, that
the cove-
nant being
to make a
surrender on
request, A.
is not bound
to make a
letter of at-
torney to
make a surren-
der, and so the breach is not assigned according to the covenant, and it ought to be an ex-
press request to make a surrender and not an implied one, and judgment accordingly for the defendant
nisi.

Id. Jo. 218, 219, pl. 8. S. C. but S. P. does not fully appear. — *Ibid.* 314, 315, pl. 1. S. C. and 3 justices (absente the Ch. J.) held that the request to surrender by letter of attorney is no request at all, and therefore the defendant was not bound to do it so or any other way with a new and better request. — *Godb.* 445, pl. 513. Trin. 8 Car. S. C. adjournatur.

[38. If *A.* and *B.* assume one to the other to perform the award of *J.* who awards that *A.* shall pay to *B.* 8*l.* 8*s.* or 3*l.* and all costs that *B.* exposuisset in *et* circa prosecutionem cujusdam placiti transgressionis inter ipsos *A.* & *B.* pendent prout per notam attornati predicti *B.* apparrerent, ad libitum ipsius *A.* In this case, *B.* is not bound to tender a note of his attorney to *A.* of the costs that he hath expended in it, without request made by *A.* to do it, because *A.* hath election to pay one or the other, scilicet, the 8*l.* which is certain, or the 3*l.* and costs of suit, which are uncertain; and *B.* does not know whether he will pay the one or the other, and therefore *A.* ought to do the first act, scilicet, to pay the 8*l.* or request *B.* to give him a note from his attorney of the costs, and if *B.* refuses to deliver it, *A.* is excused. Hill. 17 Car. B. between *Pollen* and *Kingsmead* adjudged per totam Curiam, this being moved in arrest of judgment; but some of the judges gave another reason, scilicet, because they conceived that the attorney of *B.* ought by this award to give the note, and he is a stranger, and therefore it need not be shewed before request made. Intratur Hill. 16 Car. B. Rot. 1483.]

these differences, first where the defendant is to do a single act only, and where he hath election of 2 things to do. * adly, The 2d difference stood upon this, that no notice is to be given, or tender made of a thing which lies not in the power or proper consance of the plaintiff, so as the difference stands where it is a thing which lies in the consance of the plaintiff and where not, and therefore where the award was that the defendant should pay to the plaintiff 8*l.* or 3*l.* and costs of suit, as should appear by a note under the attorney's hand of the plaintiff, it was resolved in that case, that altho' the attorney be in some respect as a servant to his master, yet to this purpose he is a meer stranger, and therefore the plaintiff was not bound to make any tender of that note, but the defendant ought to have gone to the plaintiff's attorney, and required a note of him of the costs of suit, so as he might have made his election; but they all agreed that where it is a thing which lies in the knowledge of the plaintiff, that there he ought to have made a tender or given notice, but in this case it lieth not in the knowledge of the plaintiff, and he cannot compel the attorney to make it, wherefore it was resolved that the plaintiff should have judgment.

* [277]

[39. If *A.* be bound in an obligation to *C.* of which the condition is, that *A.* shall pay to *B.* all such money, as by a true and justifiable bill, under the hand of the attorney of *B.* shall appear before disbursed by *B.* or his attorney, or any of them, or by any of their means or appointment upon such a day, in such a certain sum, between, &c. In an action upon this obligation, if *B.* assigns for a breach, that 24 s. by a true and justifiable bill under the hand of *J. S.* the attorney of *B.* appeared before to be disbursed, which *A.* did not pay, this is a good breach, without alleging that *A.* had notice thereof, or that the bill of the attorney was shewed to him, and though it was expressly alleged by *A.* that no such bill was tendred to him, by which it appeared what sum was disbursed; because the attorney was a stranger, of which *A.* ought to take notice at his peril. Hill. 15 Car. B. Rot. 432. between *Dewell* and *Wilmot*, adjudged upon demurrer.]

secuting the defendant, at the plaintiff's suit; the defendant pleaded, that it did not appear what was due to the attorney, &c. the plaintiff replied, that 9*l.* was due, of which the defendant had notice, but did not pay it; the defendant re-joined, that it did not appear what was due, &c. and traversed the

notice; and upon demurrer the plaintiff had judgment, because *the attorney was a stranger to the action*, and the defendant ought to take notice at his peril, what was due to the attorney; 'tis true where the matter falls under the cognizance of the plaintiff himself, he ought in such case to give the defendant notice.

40. In case of an obligation, *where the subject matter of the notice is secret*, and ex parte the plaintiff, notice is necessary. Jenk. 311. pl. 92.

41. Covenant. The case was, A. covenanted with B. *to make such assurance as his counsel should advise*; the court held clearly that B. must give notice of the assurance, for otherwise A. does not know his counsel, or their advice. Cro. E. 9. pl. 1. Mich. 24 and 25 Eliz. C. B. Bennet's case.

Cro. E. 517.

pl. 42. Hal-

lins v. Can-

nard. S. C.

adjudged.—

Ow. 157.

S. C. but

not said to

be adjudg-

ed; but

Walmley

said that the charge ought to precede the assurance, but he should first declare what manner of assurance should be made; and Beaumont of the same opinion.——Mo. 457. pl. 631. S. C. adjudged for the plaintiff; but it was held by the whole court, that if the assurance had been express'd in the covenant, viz. that he should levy a fine, or make a feoffment, at the costs of the covenantee before such a day, there the covenantee ought to tender the costs.——5 Rep. 22. b. Halling's case. S. C. adjudged; and it was said that it was all one when the covenant was general, and when it was particular; as, if it was to make a feoffment, the covenantor ought to do the first *est*, viz. to shew what manner of feoffment he would make, whether by indenture or deed poll, &c.——D. 371. a. pl. 1. Marg. cites Mich. 38 & 39 Eliz. C. B. the S. P.——S. C. cited by Anderson, as adjudged 35 & 36 Eliz. And. 300. pl. 309 in case of Frank v. Foster, in which case S. P. was agreed accordingly. Trin. 34 Eliz. and some inclined that the covenantor ought to give notice also of the costs and charges which ought to be paid or tendered before the sealing and delivery thereof, or other thing done by the defendant.——S. C. of Frank v. Foster, cited as adjudged accordingly, which Glanvill affirmed, he being of counsel therein. Cro. E. 517. pl. 42.

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Noy. 111.

Fletcher v.

Muffet.

S. C. but

S. P. does

not appear.

43. Covenant to assure such copyhold land to the plaintiff, if he married with his daughter, and alleged that he rite & legitime espoused the daughter of the defendant; it is sufficient for the plaintiff to allege, licet sapius requisitus, without giving notice of the marriage, for he at his peril ought to take notice thereof; judgment for the plaintiff. Cro. J. 102. pl. 35. Mich. 3 Jac. B. R. Fletcher v. Pinset.

S. C. cited

2 Sid. 115.

44. In case the plaintiff declared, that *there being a difference between him and the defendant, concerning how much rent he ought to pay; the defendant promised, that if J. S. would say that the rent reserved was 6 l. then he would pay double that sum*, and that the said J. S. did affirm the rent to be 6 l. After verdict, upon non assumpsit, it was mov'd in arrest of judgment, because the plaintiff did not allege that he had given notice to the defendant, but only that J. S. did affirm that the rent reserved was 6 l. but adjudged for the plaintiff; for the defendant is to take notice of what J. S. should affirm, and so the declaration good without alleging any notice given. 2 Bulst. 143. Mich. 11 Jac. Child v. Horden.

45. A. at B's request, demised a house to J. for a year, rendring 50 s. quarterly, and B. promised, *that if J. did not pay the rent he would*; notice need not be given of the non-payment, but B. at his peril, must take notice of the non-payment, and pay the rent; for otherwise the promise is broken; and so a judgment in B. R. was affirmed in the Exchequer-chamber. Cro. J. 684. pl. 2. Hill. 21 Jac. Brookbank v. Taylor.

46. The testator made a *lease of lands for years, rendring rent, and devised the reversion to T. in fee, and by his will declared, that his intention was, his executors should have the reversion during the term, upon condition that they give bond to the said T. within six months after his decease, by the advice of the overseers of his said will, to pay him 34 l. per annum during the said term. The executors within 3 months shewed the will to the overseers, but they advised no bond, nor was any given by the executors, nor any rent paid, though required by the plaintiff.* Adjudg'd this was a condition by which the term was vested in the executors, but it was in T: till the condition was performed, which not being done, he in reversion shall have the rent. Win. 69. Hill. 21 Jac. C. B. Treherne v. Claybrooke.

appears, but nothing said to it,

47. Lessee for years covenanted to *find necessary provision for the steward, and the lord, and his servant, and horses, at all times when he should hold courts there.* Per Doderidge, the lessee shall take notice when the courts are to be holden, and no personal notice need be given; for a general notice is given him, as by the proclamation at the court. Palm. 532. Pasch. 4 Car. B. R. the bishop of Rochester v. Young.

48. A promise was *to pay so much money at the full age of an infant*; it was held, that notice need not be given of his attaining his full age, because it is *as notorious to the one as to the other.* Hard. 42. Arg. cites Pasch. 23 Car. B. R. Page v. Barnes.

49. In debt upon an obligation *to pay so much money upon the return of such a ship from sea, notice of the return need not be given*; but where a thing lies more properly in the conscience of the plaintiff than of the defendant, there notice shall be given, as in the cases that have been cited by the adverse party, viz. *to give the plaintiff so much for a commodity as any other had before that time given him for the like, or to give so much for every cloth the plaintiff should buy, or to pay the plaintiff what damages he had sustained by a battery, or to pay the plaintiff's costs of suit.* Hard. 42 cites Trin. 23 Car. B. R. Bear v. Choldwich. [279]

50. Assumpsit, &c. *to pay the plaintiff 2 s. a-piece for every piece of cloth he should buy for the defendant, and declares for so much money due, and shewed a request.* After verdict it was moved, *that he had not alleged that he gave notice to the defendant how many cloths he had bought for him*; to which it was answered, *that they were bought for the defendant himself, and he may take notice of the number without any notice given him*; and that the request set forth, for the payment implies a notice; but Roll said, *that the request does not imply a notice, and that so is Twist's case*; and besides, *the*

have 10 l. notice ought not to be by implication, but must be averr'd certainly; and alleged sed adjournatur. Sty. 53. Mich. 23 Car. B. R. Tanner v. Lawrence. a special request of the

10 l. to be paid by the defendant according to his promise; and that after verdict it was moved, that the plaintiff had not averred he had given the defendant notice how many pieces he bought for him; resolved that notice is necessary, and not supposed by the special request; for the defendant cannot tell that so much is due as the plaintiff requires, unless he had notice how much he bought for him; and judgment against the plaintiff.

All. 68. S.C. 51. A. covenanted to surrender to B. copyhold land upon request; adjudged, assigning a breach, that he did not surrender it into the hands of two tenants of the manor is not sufficient; for he may surrender it into the hands of the lord, or in court, and the surrendering into the hands of two tenants is only a particular way. Sty. 107. Trin. 24 B.R. Pasch. 9 Car. in Car. B. R. Freeborn v. Purchase. case of Sims v. the lady Smith.—And Sty. 107. cites 9 Car. Sims v. Walker accordingly.

52. L. promised J. the plaintiff, to enter into a judgment to him for so much money as H. owed the plaintiff, if he would take common bail of defendant in case H. should die before Mich. After verdict it was moved, that it did not appear that the plaintiff gave notice to the defendant how much was due from H. But Roll Ch. J. said, that notice was not necessary; for defendant, at the time of the assumpsit, had taken upon himself to know it, but if it was necessary, he might have gone to H. to tell him, and so it shall be intended that he both knew it himself, and also might have known it by others; and Nicholas and Ask were of the same opinion, but Jerman doubted; and judgment pro Quer' Nisi. Sty. 184. Mich. 1649. Johns v. Levilton.

Vent. 6. 53. A. the defendant promised B. the plaintiff, that if she married with the consent of C. he would settle such a farm on her for the advancement of her marriage. B. married, and for not settling the farm B. and her baron brought action surcase. After a verdict, and 1300 l. damages, it was moved in arrest, that the plaintiffs had not given the defendant notice of the consent of C. but where one may take notice as well as the other, no notice need be alleged, and judgment was given per tot. Cur. for the plaintiff. 2 Sid. 115, 116. Mich. 1658. B. R. Sprat v. Agar.

B. 50 l. in assumpsit for the 50 l. Exception was taken because the plaintiff had not declared, that he gave the defendant notice of the marriage; but the Ch. J. said it had been adjudged, that where the plaintiff is upon marriage of the defendant's daughter to have 20 l. that the action lies without notice, and he thought there was no difference as to this between a daughter and this case of a niece, wherefore, &c. Sid. 36. pl. 4. Pasch. 13 Car. 2. C. B. Brown v. Stephens.

All. 9. 54. The defendant took the plaintiff's son to be his clerk, and Needler v. Guest, but S. P. does not appear. [280] covenanted to give him so much for every quire of paper he should write, and for non-payment the plaintiff brought his action, without alleging notice, and resolved to be good; for each of them may take notice how many quires of paper are written, it being to be done by a third person. 2 Sid. 115. cites it as the case of Needler v. Kefs, [alias Guest.]

55. Debt upon a bond of 200 l. conditioned to pay 100 l. on the 10th day of January, upon 3 months warning. The defendant pleaded, that the plaintiff had * [not] given 3 months warning. Windham J. said, that although it had been to pay on the 10th January after the date of the obligation, upon three months warning by the obligee, and the obligee omits the warning, yet the money shall not be lost, and that so it had been resolved in the time of Roll Ch. J. and that the other shall be bound to pay it at any three months warning. Adjournatur. Raym. 61, Mich. 14 Car. 2. B. R. Lawton v. Witherington,

January; or three months warning. The defendant pleaded *actio non*, because the plaintiff did not give three months warning next after the sealing the obligation. The court on the first motion thought the warning ought to be given by the plaintiff, because otherwise, if the defendant would never give warning, the money would never be paid; et adjournatur. But upon its being moved again they held, that it shall be taken that the obligor is to pay the money upon the 10th January next, he giving the plaintiff three months warning thereof; for the words shall be taken strongest against the obligor, and ordered judgment for the plaintiff nisi. — Keb. 380. pl. 86. S. C. adjournatur. Ibid. 415, pl. 122. S. C. adjudged for the plaintiff nisi. — Lutw. 409. Pasch. 2 Jac. 2. Terry v. Wade, S. P. and held that notice ought to be given by the defendant.

56. In covenant to make a lease for lives, the defendant pleads, that none of the lives were named by the plaintiff, to which the plaintiff demurred; and per Cur. judgment for the defendant, and that the plaintiff must name them. 3 Keb. 203, pl. 60. Trin. 25 Car. 2. B. R. Twyford v. Buckley.

57. B. ow'd A. 30 l. by bond. C. promised A. that if he would deliver up the bond he would pay A. the 30 l. In assumpsit A. declared that he delivered up the bond to B, whereof C, the defendant had notice, but had not paid the 30 l. A. had a verdict, and the court held, 1st, that delivery must be intended to the obligor, for that is properly a delivering up, and delivering up must be construed the most effectual delivery, which is such, as that the bond may be cancelled. 2dly, There needs no notice, because the defendant C, knew who to resort to, and the difference is, where a person is named, and where not. 2 Salk. 457. pl. 2, Pasch. 4 Ann. B. R. Smith v. Goff.

58. R. agrees to deliver to the plaintiff C, 31 bags of hops at London, on or before the 31st of October. It was objected that the plaintiff, to allege a proper breach of this agreement, ought to shew at what place he appointed the goods to be delivered; sed non allocatur. Resolved, 1st, That where a sum of money is to be paid, which is a sum in gross, and collateral to the title of the land, the feoffor must tender the money to the person of the feoffee, and it is not sufficient to tender it upon the land. Contra, it is of a rent that issues out of land; but if the condition of a bond or feoffment be to deliver wheat, or other ponderous things, the obligor or feoffor is not bound to carry the same about, and seek the feoffee or obligee, but before the day he must go to the feoffee or obligee, and know where he will appoint to receive it, and there it must be delivered. 2dly, That R. ought here to have gone to C. and to have asked him where he would have the goods delivered, i. e. at what place in London, and as C. was to name the place, so R. was to tell the time when he would deliver them.

them, that C. might be ready to receive them; so that *one has the election of the place, and the other of the time*; the doing the thing lies on the obligor, but he is excused where the goods are ponderous, and where he cannot do all, he must do as much as he can; the obligee has agreed to do nothing. *Three things are requisite, 1st, requesting a place for the delivery. 2dly, A place appointed. And 3dly, A time*, because the obligor may deliver at any time. Judgment for the plaintiff. Trin. 4 Geo. B. R. Colwell v. Sir Ralph Ratchiff.

[281] (B. d) What Thing shall *excuse* the Performance of the Thing, [Condition.]

Where he that is to have the Advantage ought to *do the first Act,*
Where *before Notice.*

[1.] F a man *assumes* to me, in consideration that I will enter into an obligation to J. S. for his debt, to save me harmless from all such obligations in which I shall enter to J. S. for his debt not exceeding 500 l. If I enter into an obligation to J. S. under 500 l, he ought to save me harmless at his peril, without any notice given to him that (*) I have entered into an obligation, because he hath bound himself to it. Hill, 14 Ja. B. R. between Gerrard and Payne adjudged.]

[2. If the condition be, that he shall pay so much as he shall be found in arrear before such auditor as the obligee shall assign; when the auditor is assigned, he ought to take notice at his peril how much he is found in arrears, and perform it. † 18 E. 4. 18. 24. My Reports, 13 Ja. per Coke.]

† S. C. cited 8 Rep. 92. b.—Br. Debt. pl. 168. (169.) cites S. C. —Br. Notice, pl. 23. cites S. C. —Roll. Rep. 286. in pl. 2. Hill. 23 Jac. S. P. by Haughton.

[3. So if the condition be to stand to the award of J. S. he ought to take notice of the award at his peril, and perform it. † 18 E. 4. 18. 1 H. 7. 15. Contra, 7 H. 8. Kellowey 175.]

Tit. Arbitrement, (E. a) pl. 14. Collet v. Padwell.

[4. If the condition of the obligation be to pay the damages that shall be recovered by J. S. against him; he ought to take notice of the sum recovered at his peril, and pay it. 18 E. 4. 18.]

[5. If a man promises another to pay him so much at the marriage of a stranger, he ought to take notice of the marriage at his peril, without notice given. My Reports, 14 Ja. Beresford and Goodrouse.]

S. P. by Haughton J. quod fuit concessum per Cur. Roll. Rep. 434. in S. C. —See (A. d) pl. 3. 4. S. P.

[6. If A. be indicted in a leet for incroachment upon the highway, and after A. dies, and B. his heir continues the incroachment, and thereupon

Jo. 449. pl. 14. S. C. is a different

thereupon an order is made for leet, that B. shall reform the incroach-
ment by a day upon the pain of 40 s. and for not reforming thereof, the
lord of the leet brings an action of debt for the 40 s. and declares
thereupon as before; this is a good declaration, without alleging that
B. had notice of the order made; inasmuch as he is within the jurif-
diction of the leet, he ought to take notice thereof at his peril. (B) pl. 4.
Mich. 11 Car. B. R. between *Lee and Boothby*, adjudged per Cu-
riam, this being moved in arrest of judgment. Intratur, Tr. 11
Car. Rot. 1002.]

7. Debt upon bond condition'd that the obligor should make an
estate of inheritance to the obligee, at such a day and place; the de-
fendant pleaded that he was ready at the day and place, &c. to make
an estate of inheritance, &c. The plaintiff demurred, because de-
fendant * had not set forth that he gave the plaintiff notice what estate
he would make; and Roll Ch. J. held the plea ill, and judgment nisi,
&c. Sty. 61. Mich. 23 Car. Brook v. Brook.

he would make him such a conveyance, to the making whereof the presence of the plaintiff was ne-
cessary; but if the condition had been for the making a feoffment, then because a day certain was ap-
pointed, the plea had been good; for the plaintiff at his peril ought to attend at the day.

* [282]

8. Debt upon bond conditioned, that whereas the plaintiff was
bound with the defendant (who was an exciseman) that he should give
a true account in the Exchequer for such monies as he should receive
for excise, &c. that the defendant should save him harmless, &c. He
pleaded that no suits, process, &c. were against him on that bond,
and so he saved him harmless. The plaintiff replied, that a scire
facias was brought against him out of the Exchequer upon the said
bond, and that he was forced to retain an attorney, and paid 1s. for
his appearance. The defendant demurred, because the plaintiff
did not allege that he gave him notice of the scire facias; adjorna-
tur. Vent. 35. Trin. 21 Car. 2. B. R. King v. Atkins.

Morton held that particular notice was not requisite, because the defendant took it upon himself to
acquit the plaintiff.

9. Lessee of a mill covenanted to leave the mill-stones as good as
when he entered, or to pay the difference according to the discretion of
the parties who viewed the same at the first, and gave a bond for
performance of covenants. In debt on the bond, the defendant
pleaded that he left 2 stones in the mill at the end of the lease, and
that the persons who viewed those which were there when he entered
had not agreed how much those that he left were worse than the other.
Upon demurrer, the plaintiff had judgment; (Treby Ch. J. and
Powel J. being only present) for this being a disjunctive covenant,
and by consequence for the advantage of the defendant, and he
having undertaken that such persons shall adjust the value who were
strangers to the agreement between him and the lessor, he must
procure them to do it, and if he cannot, he must leave as good
stones in the mill as those were when he entered. Lutw. 688. 693.
Trin. 9 W. 3. Studholme v. Mandall.

defendant, because the performance of the covenant is render'd impossible by the act of the obligee:
Arg. And of this opinion was the whole court.

(C. d) At

See (F. c)
pl. 1. (C. d) At what Time it ought to be performed
where no Time is limited.
[Or rather, in what Case Notice is necessary.]

[1.] F. A. promises B. in consideration that he will marry C. his daughter, that he will give in marriage portion to B. with C. such portion, and as good an estate in money as he had given or after should give with any other. In an action upon this promise, if the plaintiff avers that he married C. and that after B. [A] gave 100 l. in money and goods to D. another daughter, in consideration of the marriage-portion of D. this is a good declaration, without any averment, that he gave notice of the marriage with C. to B. [A.] because

[283] he had taken this upon himself. Tr. 22 Car. B. R. between *Ward and Green*, adjudged. Intratur, P. 22 Car. Rot.]

Roll. Rep. 355. pl. 7.
S. C. but
S. P. does
not appear.
— A man
was bound
to H. to pay
him 1000 l.
after that
he had mar-
ried his daughter, and afterwards he married her, and brought debt upon this obligation, and it was
not averred that he had given notice of the marriage, but demanded the money. It was argued that here
was an implied notice, because the marriage was at the instance of the defendant, which implies a no-
tice. It was agreed that judgment should be given for the plaintiff, and in Trin. Term next following
judgment was accordingly given for the plaintiff. Poph. 164. Pasch. 2 Car. B. R. *Hodges v. Moe.*
— See (A. d) pl. 3. S. C. and the notes there. — See (B. d) pl. 5.

[2. If one promises another, in consideration that he will marry his daughter, to give him 20 l. at the day of his marriage; he ought to take notice of his marriage at his peril, without any notice given thereof by the other. My Reports, 14 Ja. *Beresford and Goodrouse*, adjudged.]

[3. So if no time of payment had been appointed in this case. Tr. 7 Ja. Rot. 735. adjudged. My Reports, 14 Ja.]

Roll. Rep. 434. cites
34 Eliz.
Rot. 238.
Hodges v.
Wanley.
S. P. —
Cro. J. 405.
in pl. 3. cites Trin. 44 Eliz. Rot. 238. *Hodges v. Wanley*, but that only mentions the point of no
time being alleged.

[4. So if a man, in consideration of 6 d. promises to give me 20 s. at the day of my marriage, he ought to take notice of my marriage at his peril, without notice given by me, because he hath undertaken to pay it at the day. My Reports, 14 Ja. 44 El. Rot. 238. adjudged.]

See (A. d)
pl. 15. the
same cases
and the
notes there.
[5. If a man sells certain weys of barley to me, upon which I promise to pay him so much for every wey as other men give for a wey, in this case the action does not lie without notice before given for how much he sells a wey to other men. My Reports, 13 Ja. *Haul and Hemmings*, adjudged. 14 Ja. *Holmes and Twiss*, P. 13. Ja. in *Camera Scaccarii*, for *Woad*.]

[6. If I promise another, for a consideration, to give him 20 l. when he comes into *Somersetshire*, he need not give me notice when he goes there, because this is a duty by the coming into *Somersetshire*. My Reports, Mich. 13 Ja. * *Richardson's case*, B. adjudged. Contra, my Reports, 13 Ja. *Morse and Gardiner*.]

Fol. 469.

* See (A. d)
pl. 5. S. C.
and the
notes there.

[7. If

[7. If a man sells land by the name of 20 acres, and covenants to repay so much for every acre under this number, and that it shall be measured by such a man before such a day; if part is measured accordingly, the covenantor ought to take notice thereof at his peril, without any notice given by the other. My Reports, 13 Ja. Sir Baptist Hixt and Goates.]

See (A. d) pl. 7. S. C. and the notes there.

[8. So in the said case, if the covenant had been, that the land should be measured by two men, scilicet, one by the assignment of each party, before such a day, and one assigns, and gives notice to the covenantor of the time of the measuring; if the other does not assign any for him, but he that is assigned measures it alone, the covenantor ought to take notice thereof at his peril, for it is his default that his man was not there; and therefore it is as if the other had been only appointed to measure it. My Reports, 13 Jac. Goates and Sir Baptist Hixt, adjudged.]

See (A. d) pl. 8. S. C. and the notes there.

9. Case against the defendant as executor upon a promise made by his testator for a marriage-portion, and the plaintiff did not set forth that notice was given to the defendant of the marriage; adjudged, that where a collateral thing is to be done at or after marriage, there notice ought to be given of it; but where money is to be paid, in such case it is a debt due to the party, and may be recovered without any notice given of the marriage. 2 Bull. 254. Mich. 12 Jac. Selby v. Wilkinfon.

(D. d) Where the Want of Notice will excuse the [284]
Performance of the Condition.

[And at what Time Notice, if given, ought to be given.]

See Tit. Notice (A. 2) per totum.

[And in what Cases Notice shall be intended.]

[1.] F A. and B. levy a fine to the use of A. in fee, if B. does not pay 10 s. to A. at Michaelmas after, and if he does pay, then it shall be to the use of A. for life and after to B. in fee; and after B. dies before Michaelmas, the heir of B. ought to take notice of the condition at his peril; so that if he does not pay the 10 s. at Michaelmas, A. shall have the land absolutely in fee, for A. is not bound to give him notice, nor is any other appointed by the law to give notice in this case, and therefore he ought to take notice thereof at his peril, for he is as privy in law to the estate limited by the fine, and indenture of uses, as the ancestor himself, and the ancestor had power to give the land absolutely, and divers times in such case it is not known who is heir. Trin. 13 Car. B. R. between Spring and Sir Julius Caesar master of the rolls, adjudged per Curiam in a writ of error upon a judgment in banco in a quare impedit. Intratur, Mich. 11 Car.]

See (T) pl. 12. S. C. but the point of notice does not appear.—S. P. agreed by all, and judgment for the plaintiff, Jo. 390. Pasch. 13 Car. B. R. the S. C.—Win. 103. to 110. and 115. to near the end of fol. 150. Mich. and

Hill. 22 Jac. Cooper v. Edgar, S. C. argued by the serjeants, but nothing said by the court.

[2. If

Cro. C. 571.
pl. 9. Hill.
15 Car.
Anon. seems
to be S. C.
and though
it was al-
leged that
the defend-
ant habens
motitiam
inde, and
though upon
such a day

he was requested he had not paid, yet it was held clearly, that the declaration was insufficient for this cause; for he ought to have alleged express notice, and shewn the day and place of such notice given; and for this and another cause the judgment was reversed. — See (A. d) pl. 12, 13. and the notes there.

Sty. 172.
S. C. the
exception
of the want
of notice
was taken
by Roll Ch.
J. and that
the plaintiff
made no de-
mand dur-
ing the fair
of any sum

(*) Fol. 470.

of money
due, and
that so the
declaration
was too ge-
neral, and
the counsel

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Sty. 295.
S. C. ad-
journatur,
to be ar-
gued again.
— Ibid.
303, 304.
S. C. was
spoken to
again, but
the court
were di-
vided, and
would ad-
vise. —
But at the
end of the
case fol. 295.

says that upon its being argued again the next term, judgment was then given for the plaintiff, for the reason mentioned in Roll. — Raym. 400, 401. Arg. cites, S. C. as adjudged accordingly.

[2. If *A.* in consideration of 10 l. given to him by *B.* assumes to pay 20 l. when such a ship, which was ready to go from *D.* to *Hamburg*, beyond the seas, should go from *D.* to *Hamburg* and return to the same place, scilicet to *D.* aforesaid; it seems he ought to pay the 20 l. upon the return of the ship, without any notice given by the obligee; for he hath taken upon himself to pay it at his peril upon the return of it. Contra, H. 13 Car. B. R. between *Bully* and *Hubbins*, adjudged per Curiam, in a writ of error upon a judgment in the Marshalsea, where the judgment was reversed for not alleging notice of the return.]

[3. If *A.* promises *B.* in consideration that *B.* will permit *A.* and *C.* to enjoy a tavern in *Sturbridge-fair* during the fair, to pay to *B.* 10 l. for the use of the tavern; and also that before the end of the fair, he will pay all such money as *B.* shall disburse for wine and beer for the said *A.* and *C.* during the fair aforesaid, to be expended in the said tavern. In an action upon this promise, after the end of the fair, if the plaintiff does not aver, that he gave notice before the end of the fair, how much he had disbursed for wine and beer for them to be there expended, this is not good, though he avers how much he disbursed for it; and a demand thereof after the fair is not sufficient, for *A.* could not know how much he had disbursed without notice, and notice thereof after the fair is not sufficient (*) in as much as it is to be paid for by *A.* during the fair. Mich. 1649. between *Harris* and *Gibson*, adjudged in a writ of error upon a judgment in *Cambridge*, and the judgment reversed accordingly. Intratur. P. 1649. Rot. 303.]

desiring not to be further heard in it, the judgment was reversed.

[4. If *A.* and *B.* agree and promise to marry one with another, and after *B.* the man, promises *A.* in consideration that she will disengage him of his said promise, he will give her 1000 l. In an action by *A.* against *B.* for the 1000 l. if *A.* avers, that she after the same day exoneravit ipsum (Anglice, did disengage him) of his said promise, and yet he hath not paid the 1000 l. this is a good averment of the performance of the promise, without alledging any notice given to *B.* of the disengagement; for it shall be intended, prima facie, that this disengagement was made to *B.* himself, and not in the absence of *B.* for it shall be a full disengagement made to the person of *B.* so that he should have his liberty to marry any other. Mich. 1651. between *Baker* and *Smith*; adjudged per Curiam, this being moved in arrest of judgment. Intratur.]

[5. [So] if *A. promises B. (a woman) that if she will leave her father's house, and come to his house, that he will marry her; in an action by B. against A. upon this promise, if she avers, that she hath left the house of her father, and come to the house of A. and there obtulit to marry him, and yet the said A. did not marry her; this is a good averment that B. had notice thereof; for by the obtulit to marry the defendant, is intended, that she obtulit herself to the person of the defendant himself, in as much as this is a personal act to be done between them. Tr. 1651. adjudged per Curiam, after a verdict for the plaintiff.]*

Sty. 263.
Pasch. 1651.
Peck v. Ingram S. C.
and Roll
Ch. J. was
of the same
opinion;
but adjournatur.
Ibid. 273.
S. C. adjudged for the plaintiff.

— See (A. d) pl. 3. and ibid. pl. 14. and the notes there.

6. Debt upon obligation by J. B. against J. C. who said, that the obligation is indorsed, that if *F. makes estate tail to G. before Michaelmas*, that then, &c. notice shall be given to him who takes the estate because he is a stranger to the condition; by which he pleaded accordingly. Br. Conditions, pl. 140. cites 2 E. 4. 2.

7. If a man be bound to *infeoff such a man as the obligee shall name*, there if the obligee names him to a stranger it is void; for he shall do it to the obligor who is party. Br. Conditions, pl. 150. cites 8 E. 4. 12, 13.

8. Condition to *repair a house by lessee within six months after notice*; lessee assigns part of his term. Assignee of the reversion gives notice to an under lessee then in possession of the house. This condition is merely collateral to the land, and personal, so notice is not of necessity to be given at the house, but ought to be made to the person of the lessee who has the grand interest. Yelv. 36. adjudged, Pasch. 1 Jac. B. R. Sweton v. Cuth.

Mo. 680.
pl. 932.
Swelnam v. Cuth, S. C. adjudged, that where there is no assignee the notice must be to the

person of the lessee, and need not be at the place, and the time when is to be understood when the lessee continues the estate; for in case he assigns it to another, it shall not be to the person of the assignee. — Cro. J. 9. pl. 11. Swetman v. Cuth, S. C. adjudged. — Ow. 114. Streetman v. Eversley, S. C. adjudged. — Brownl. 135. Streeton v. Cuth, S. C. adjudged, but seems to be only a translation of Yelv.

9. Lease rendring rent per annum *quandocunque, the lessor shall demand it*; if lessor comes to demand it before the end of the year his demand on the land is not good unless the lessee be there also; for the time being uncertain when the lessor will demand it, he ought to give notice to the lessee of the time; but if lessor stay till the end of the year, notice is not necessary; per Popham, quod fuit concessum. Yelv. 37. Pasch. 1 Jac. B. R. in case of Sweton v. Cuth.

Cro. J. 9.
10. S. C. & S. P. by Popham, and that the lessor's way to is appoint the lessee that such a day he will be

upon the land and demand his rent; and then if the lessee be not there to pay it upon his demand, the lease is forfeited.

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10. An estate was limited by use to *J. F. by deed after his father's death (he being heir at law to this use) and there was a proviso, that if the said J. F. should not suffer his father's executors quietly to take away the goods and chattels of his said father, which should then be in the house, then the said uses limited to the said J. F. should cease and be void.* It was resolved, that J. F. the son being a stranger by Rami-

2 Brownl.
277. Milner v. Fran-
co, S. C.
adjudged.
— V. nt.
200, 201,
S. C. cited

See J. as resolved accordingly; and ibid. 205. by Hale Ch. J. a stranger to the *seoffment*, though he had disturbed the executors contrary to the words of the proviso, yet he shall not lose his estate without notice given him of the proviso and his father's will. 8 Rep. 89. b. 92. a. Mich. 7 Jac. Fraunces's case. But said that there would have been no need of notice if he had not been heir. S. C. cited Mod. 36 & 37. Raym. 237. S. C. cited per Cur. S. C. cited Arg. 3 Mod. 31. S. C. cited 2 Show. 316, 317. Arg. S. C. cited Skinn. 126. 128. S. C. cited as agreed by Bridgman Ch. J. in delivering the opinion of the court. Cart. 172. S. C. cited Lutw. 823. and agreed by the whole court of C. B. Trin. 8 W. 3. in case of Whalley v. Read, that this case is good law, and a good point adjudged there accordingly.

11. In debt upon a bond of 200 l. conditioned to pay 100 l. to the plaintiff on his marriage-day; defendant pleaded in bar, that he had no notice given him of his marriage-day. Coke and the whole court agreed herein, that no notice of the marriage-day was here to be given, but that at his peril he ought to take notice of it; and judgment was given for the plaintiff. 2 Bulst. 254, 255. Mich. 12 Jac. Selby v. Wilkinson.

12. Lessee for years was bound in a bond to deliver possession of a house to lessor, his heirs and assigns, upon demand at the end of the term. The lessor bargained and sold the reversion to A. and B. by deed inrolled. At the end of the term B. demanded delivery of the possession. The lessee refused, pretending that he had no notice of the bargain and sale. It was adjudged, that the bond was forfeited. Godb. 272. Pasch. 16 Jac. B. R. Ingh v. Payne.

All. 21. S. C. the plaintiff set forth that he was damaged by the said battery 30 l. which the defendant, though at such a time and place requested, had not paid, and adjudged for the plaintiff, tho' he had not given notice to the defendant how much he was damaged; for the defendant took upon him to pay the damage sustained, which when the plaintiff ascertains to him, the defendant at his peril must pay him on request, if in truth he was so much damaged. 13. The defendant promised, that if the plaintiff would forbear his suit against one B. who had assaulted and beaten him, that he would pay the plaintiff as much as he was damaged by the said assault; it was moved after verdict, that the plaintiff did not set forth that he gave the defendant any notice what damages he had sustained by the battery; but the court held, that as to the notice of what damages the plaintiff had sustained, the request to perform the assumpsit implies that sufficiently, and gave judgment for the plaintiff. Sty. 57. Mich. 23 Car. Finer v. Jeffery.

Skinn. 125. pl. 4. Mattoon v. Fitzgerald, S. C. argued sed adjournatur. Ibid. 179. pl. 8. S. C. adjudged accordingly and so a judgment in Ireland was affirmed. 2 Show. 315. pl. 330. 14. J. F. seized in fee, had issue K. his only daughter, and settled his lands upon trustees, and their heirs to the use of himself for life, and after to K. in tail, provided she married with the consent of the trustees, or the major part of them, &c. but if not, then the said trustees should raise a portion out of the said lands for her maintenance, remainder over to Lætitia (his sister) in tail, &c. The daughter K. being then but 2 years of age, had notice of this settlement at 14 years old, but not by the direction of the trustees; and at the age of 18 years she married, &c. without the consent of the trustees, or the major part of them. It was argued that the estate tail to K. was determined, and that notice was not necessary to be given her, because her father had not order'd it in his settlement, and that he might dispose of his estate as he pleased; and having made

made particular limitations of it, there is no room now for the law to interpose, to supply the defect of notice in the deed; that as K. took notice what estate she has in the land, so as to pursue * a proper remedy to recover it, so she ought to take notice of the limitations in the settlement, and has the same means to acquaint herself with the one as with the other, and the same likewise as her aunt had to know the remainder. But in Easter term following it was adjudg'd that the estate tail was not determined for want of notice, according to the resolution in Frances's case. 3 Mod. 28 to 35. Mich. 35 Car. 2. B. R. Malloon v. Fitzgerald. Mallowes v. Fitz Gerard S. C. argued. — Like point in the case of Williams and Fry, per Curiam. a Lev. 22. Mich. 23 Car. 2. B. R.

(E. d) What collateral Thing shall be said a Satisfaction. See Tr. Accord per totum.

[1.] If the condition of an obligation be to pay 10 l. at a day; if * Brownl. 71. S. C. adjudg'd per tot. Cur. that the plea is naught; for one chose en action cannot be a satisfaction for another chose en action; but this being at the day of payment he enters into another obligation to the same obligee for the same sum as the first was, and this with a surety, which was more than was done in the other, yet this is not any discharge of the first obligation, because it is but a thing in action, and no present satisfaction; and this was adjudged twice in banco. Mich. 13 Ja. upon demurrer, and there other judgments cited accordingly, quod vide, Tr. 13 Ja. B. between * Hawes and Birch adjudged. Hobart's Reports 94. between † Lovelace and Arthur, adjudged upon demurrer.]

done by a stranger is by no means good. † Hob. 68. 66. pl. 77. Mich. 6 Jac. Lovelace v. Cocket, S. C. adjudged; for it was held no actual and present satisfaction as it ought to be. — Brownl. 47. S. C. and adjudg'd; for one bond cannot overthrow another. — S. C. cited per Cur. as adjudged not a good discharge; for the obligee was in no better condition than he was before. — Litt. Rep. 58. Mich. 3 Car. C. B. Ene's case, S. P. adjudged; and it was said to have been divers times so adjudg'd; and Hutton J. said one reason was, because a chose en action cannot be a satisfaction. — Cro. C. 85. pl. 9. Anon. seems to be S. C. and ruled accordingly. — Ibid. 86. in pl. 9. S. P. cited to have been ruled by the court to be no good plea. Trin. 41 Eliz. Rot. 2409. Maynard v. Crick. — Cro. E. 716. pl. 40. Mich. 41 Eliz. C. B. Manhood v. Crick. S. C. adjudg'd accordingly. — So where a stranger join'd with the obligor in the 2d bond, it was adjudg'd for the plaintiff; for one deed cannot determine a duty upon another deed. Cro. E. 727. pl. 61. Mich. 41 Eliz. C. B. Norwood v. Grype.

Debt upon a bond of 100 l. The defendant pleaded that he delivered up to the plaintiff a bond, wherein the plaintiff was bound to him, which he accepted in satisfaction of the said bond. Resolved per Cur. this is a good plea, for although the giving of one bond is not a good satisfaction for another, yet this is tantamount to a payment when the defendant discharged such a debt due to him from the plaintiff; and so differs from the case of Hob. 68, &c. Freem. Rep. 532, 533. pl. 719. Mich. 1680. Marshall v. Jennison.

[2. If a man be bound in 20 l. in a statute, and he makes an obligation to him for it, and he accepts it, this is not any satisfaction, because the statute is of greater advantage than the obligation. 12 H. 4. 23. b.]

[3. If the condition of an obligation be to pay 25 l. at Michaelmas, and the obligor leases land to the obligee, rendering 39 l. rent at the said feast of St. Michael; and after, before the said day of payment, concordatum & agreeatum fuit, that the said obligee, being the lessee, should retain 25 l. of the said rent, in satisfaction of the said defendant obligation, and for the residuum of the rent, that he should remain answerable Debt upon an obligation, with condition that if the grants to the plaintiff be- fwerable

fore Whit- *fuverable* to the obligor, and after at the said day, because of the
sonside the *said agreement*, the obligor does not pay the said 25 l. This ob-
lease, and *ligation is forfeited*, for this agreement cannot be any discharge of
form of the *the obligation*, in as much as the rent at the time of the * agree-
mill of D. *ment made was not due.* M. 41, 42 El. B. R. between *Harring-*
Haberd, &c. *ton and Andrews*, adjudged.]

till 6 l. be *paid, that*
then, &c.
and said that before Whitsonside the defendant leased to the plaintiff the mill for term of 10 years, ren-
ding such rent per annum, &c. and that the plaintiff should retain in his hands of the rent which should
amount to 6 l. and per Needham this is good, though the rent and farm were not in esse at the time
of the obligation made, but the lease was made after; but Lefcon contra, and that the retainer of the
rent till the 6 l. be paid, is as good as payment of the rent or grant to the plaintiff of the rent till 6 l.
be paid; et adjournatur. Br. Conditions, pl. 81. cites 37 H. 6. 26.

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Cro. C. 68. [4. If the condition of an obligation be to pay 10 l. at a day,
 in pl. 7. *which is not paid at the day, but after the day the obligee accepts a*
 cites Mich. *statute staple from the obligor for the same debt, in full satisfaction o*
 2 Jac. Rot. *the obligation, yet this is not any satisfaction; for though the statute*
 3273. *be a matter of record, and higher than the obligation, yet the ob-*
 Branthwaite *ligation remains in force, and the obligee hath his election to sue the*
 v. Cornwall *one (*) or the other.* Braithwait's case, cited in Co. 6. Higgen's
 * Fol. 471. *case, 44. b. adjudged.]*

lis, S. P.
 and seems to be S. C. — 6 Rep. 45. b. the court held the case of Branthwaite v. Cornwallis to be
 good law; for a statute staple, or an obligation in nature thereof, is only an obligation recorded, and
 one obligation, be it of record, or not of record, cannot merge another obligation; besides an obliga-
 tion and an obligation in nature of a statute staple are 2 distinct liens made by assent of parties, with-
 out process of law, whereof the one has no dependance on the other; but in action on an obligation,
 the suit is founded on the obligation, and the plaintiff has judgment to recover the debt due by the
 obligation, so that by judicial proceedings and act in law, the debt due by the obligation is changed
 into a matter of record, and judgment in court of record is more high than a statute staple, merchant,
 or any recognizance, confessed by assent of the parties without judicial proceeding.

See Tit. Audita Querela (F) pl. 15. Lutterford v. Le Mayre, and the notes there.

S. C. cited [5. If the condition of an obligation be to pay 100 marks at a
 Cro. E. 697. *day, and at the day the obligor and obligee account together at another*
 in pl. 8. *place, and because the obligee owes to the obligor 20 l. by another con-*
 Mich. 41 *tract, the obligee allows the 20 l. in payment of the 100 marks; this*
 & 42 Eliz. *is a good satisfaction of the condition, for this is all one as if the*
 B. R. and *obligor had paid the obligee, and he had repaid him.* 12 R. 2.
 agreed to be *Barr. 243. This is a payment by way of retainer.]*
 good law;
 because the

agreement
 to retain is as a payment, and therefore the obligation is discharged. — Co. Litt. 212. b. 213. a.
 S. P. accordingly.

Cro. C. 195. [6. If the obligee and obligor, before the day of payment of the mo-
 pl. 3. Si- *ney to be paid by the condition, agree together that the obligor shall*
 monds v. *do several particular things, as amongst other things, to assign his*
 H ewdef- *interest in the farm of the customs of French wines, and he pleads*
 worth, S. C. *that he did all in particular, shewing how, and it appears to the*
 adjudged for *court that he could not by law assign his interest in the said customs,*
 the plaintiff. *they being in covenant only; though the obligee had enjoy'd them ac-*
cordingly, yet this is not any discharge of the obligation, in as much
as this is like an accord, so that all ought to be performed, other-
wise it is not good, because the obligee hath not any remedy for that
which is not performed. Trin. 6 Car. B. R. between *Simons and*
Moulston adjudged, this being moved in arrest of judgment.]

7. Before

7. Before the day of payment, obligee agrees to accept a *debt due by obligee to obligor*, in satisfaction of the sum payable by the condition. Mo. 573. in pl. 787. Hill. 41 Eliz. cites 12 R. 2. Fitzh. Barr. 243. which was agreed to by the court.

8. If a man by deed acknowledges himself to be satisfied, this is a good * bar without receiving anything. As 36 H. 6. 37. In debt upon a bond for 10 l. the defendant pleads that F. was bound with him, and that plaintiff had made an acquittance to F. bearing date before the obligation, and delivered afterwards, by which acquittance he acknowledged the receipt of 20 s. in full satisfaction of the 10 l. 5 Rep. 117. b. in Pinnel's case, the reporter in a nota cites 36 H. 6. Tit. Barre, 37.

9. In annuity of 10 l. the defendant pleaded that the plaintiff promised him that if he pay him annually at Easter 20 s. that the annuity should be void, and said that he paid it except at Easter last, and that then he leased to the plaintiff the vesture of an acre of land for the 20 s. and a good plea, per Curiam. Brooke says it seems that the promise was in writing. Br. Annuity, pl. 54. cites 11 H. 7. 20. and says it is there agreed that tho' an annuity be charged on land, yet another thing in recompence suffices.

Br. Conditions, pl. 246. cites S. C. — But Br. Annuity, pl. 1. cites 19 H. 8. 9. e contra, where in debt for arrearsages of

annuity, the defendant pleaded that he leased such land to the grantee in recompence of the annuity, or arrearsages of the said annuity, but the court held it no plea; for the annuity is in writing, and cannot be discharged by matter in fact; quod nota; Brooke says, quære if it was annuity by prescription, — The year-book says the plea was only matter in surmise.

10. In debt upon an obligation, the defendant pleaded in bar, that it was indorsed upon condition to make account before Michaelmas, &c. and that the plaintiff before the day had accepted of a lease at will of a house and 200 acres of land, in satisfaction of all accounts, &c. judgment, &c. The plaintiff demurred, and it was adjudg'd no bar; for where a condition is collateral, the acceptance of another thing is no bar; contrary, where the condition is to pay money. D. 1. pl. 1, 2, & 3. Pasch. 4 H. 8. Anon.

11. If A. and B. contract with C. for corn, and at the price of 100 l. and after C. takes bond from A. only for the money, now is B. discharged of the debt, because B. stood charged only by the contract, which is extinguished by the said speciality. Went. Off. Ex. 116, 117.

12. In debt on bond of 150 l. the defendant said he was possessed of 3 writings, viz. a release by one F. of all his right in such lands to persons, &c. and that he delivered all those writings to the plaintiff in full satisfaction of the said debt, and that he accepted it. Manwood held the plea ill for want of alleging a value, as if he had said that he had given him a rush or a feather it would not be good, because of no value; besides perhaps the plaintiff may take issue on the value; whereupon the counsel for the plaintiff said he would put in a value. Dal. 105. pl. 51. Anno 15 Eliz. Temple v. Atkinson.

13. In debt on bond for 300 l. the condition was, that a stranger should make a good estate to the plaintiff and his heirs of lands in E. in the county of N. The defendant pleaded that the plaintiff

had accepted a judgment with certain covenants therein contained, in full satisfaction for the 300 l. and adjudged per tot Cur. to be no plea. D. 1. a. Marg. pl. 1. cites Mich. 27 & 28 Eliz. B. R. Dod v. Alphin.

14. If a feoffment in fee be made, on condition to pay 100 l. on such a day, and at the day the feoffees make an obligation to feoffor for payment of it, the same is no performance of the condition; per Anderson Ch. J. Le. 112. pl. 153. Pasch. 30 Eliz. C. B. in case of Stamp v. Hutchins.

15. Debt upon obligation dated 29 April 23 Eliz. conditioned to pay 10 l. at St. Thomas's day next at the church porch of N. The defendant pleaded, that before the said feast the plaintiff agreed, that if he would provide for him 6 l. and pay it at his house in N. the 15th of December next, and promise to pay the other 4 l. at Midsummer day following, he would accept of it in satisfaction of the said sum of 10 l. and defendant pleaded payment of the 6 l. at the day, and that plaintiff accepted his * promise for the rest in full satisfaction. It was the opinion of the justices, that it was no good plea to avoid an obligation upon such naked matter, and gave judgment for the plaintiff. Cro. E. 304. pl. 1. Mich. 35 & 36 Eliz. B. R. Balston v. Baxter.

The defendant pleaded acceptance after the day, but held the plea not good.

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16. Debt on bond of 14 l. for payment of 7 l. Defendant pleads payment at the day; it was found the defendant paid 50 s. in part, and that defendant then delivered hats to the plaintiff to the value of the residue, which he accepted. Adjudged against the defendant, for this is no payment, but he might have pleaded specially this matter, and then the acceptance of the plaintiff had been a bar. Cro. E. 309. pl. 17. Mich. 35 & 36 Eliz. B. R. Thimblethorp v. Hunt.

17. Condition of a bond was, that if A. appear before the plaintiff at the commissary's court at Oxford; such a day, that then, &c. Defendant pleaded that he appeared before the plaintiff before the day at S. which the plaintiff accepted of, and allowed for his said appearance to be at O. &c. Adjudged for the plaintiff on demurrer, because it was to do a collateral thing, and the acceptance of another thing cannot dispense therewith, nor is a discharge of the bond. Cro. E. 458. (bis) pl. 4. Pasch. 38 Eliz. B. R. Norton v. Risden.

18. Debt upon an obligation conditioned for the payment of 20 l. at a day certain. The defendant pleads, that before the day the plaintiff, in respect of a trespass by his beasts in the defendant's land, gave unto him a longer day of payment, which is not yet come. It was adjudged for the plaintiff; for a parol agreement cannot dispense with an obligation. Cro. E. 697. pl. 8. Mich. 41 & 42 Eliz. B. R. Hayford v. Andrews.

19. In debt on a bond, the condition of the bond being, that the defendant should pay a sum of money unto the plaintiff on the birthday of the first child of the plaintiff, &c. The defendant pleads, that after the bond, and before the birth of the child, the plaintiff accepted

cepted of the defendant one load of lime in full satisfaction dicti scripti obligationis, &c. Held to be an ill plea, for this cannot be a discharge of an obligation by words, but by writing. *Contra* if the acceptance had been of the load of lime in full satisfaction of the sum of money contained in the condition. 1 Bullst. 66 Mich. 8 Jac. Neal v. Sheffield.

20. In debt upon bond, the defendant pleaded acceptance by the plaintiff of a bill sealed for the same money after the obligation made. Adjudged no good plea. Mo. 872. pl. 1212. 12 Jac. Beard v. Heynes.

21. In an action of debt brought upon a bond for payment of money such a day; the defendant pleads, that he the same day made an obligation for the payment of the said money another day, which the plaintiff accepted for the money, and issue taken thereupon, and tried for the defendant; and after the verdict the plaintiff moved the court to have judgment, though the verdict passed against him, because the plea was insufficient, and that he confessed the debt, but the court would not grant it. Brownl. 74. Trin. 13 Jac. Rawdon v. Turton. The like Mich. 6 Jac. Rot. 1061. and the like Hill. 12 Jac.

22. If a man be bound to pay 20 l. by bond, and the obligee, for a less sum paid by the obligor, promises to deliver the bond; if this be not any satisfaction of the debt, yet it is sufficient to ground an action of the case upon, because he has no remedy for the money; per Coke Ch. J. Roll. Rep. 355. pl. 5. Pasch. 14 Jac. B. R.

23. In debt upon a single bill, the defendant pleaded, that he infeofed the plaintiff of such land in discharge of the said bill, which he accepted, and it was held an ill plea. Cro. C. 86. in pl. 9. cites Trin. 14 Jac. Rot. 734. Oliver v. Lease.

24. The condition of an obligation was to make an assurance of [291] lands to such uses as therein expressed; an acceptance of a feoffment thereof to other uses was pleaded, but held ill, because he ought not to vary from the condition. Brownl. 60. Hill. 14 Jac. Potter v. Tompson.

25. In debt on bond against the heir of the obligor, he pleaded, *Mod. 221. pl. 9. S. C. but not S. P. — 2 Mod. 136, 137. Peck v. Hill, 8, C. but that in debt brought against the defendant as administrator, and by 3 justices held accordingly; and* that the obligor died intestate, and that J. S. administered, and had given the plaintiff another bond in full satisfaction of the former, &c. Upon issue the defendant had a verdict. It was held, that if the second bond had been given by the obligor himself it would not have discharged the former, but it being given by the administrator, so that the plaintiff's security is better'd, and the administrator chargeable de bonis propriis, it is a sufficient discharge of the first bond, per 3 justices, contra Atkins; and Windham J. said, that otherwise the heir and administrator might both be chargeable; and judgment for the defendant nisi. Mod. 225. pl. 14 Trin. 28 Car. 2. C. B. Blythe v. Hill.

that the administrator being now chargeable in his own right, it may well be said in full satisfaction of the first obligation, and that if a security be given by a stranger, it may discharge a former bond, and this in effect is given by such; but Atkins inclined e contra.

In debt upon bond condition'd to pay 10 l. the defendant pleaded an agreement that defendant should give the plaintiff a new security for this debt and another, and that he being executor of the obligor,

obligor, and the person with whom the concord was made, gave thereupon a penal bill sealed by himself; but judgment was given for the plaintiff; for one bond given in satisfaction of another is no discharge, be it given by agreement or not, and the agreement cannot mend the matter, and yet here the new bond binds him *de bonis propriis*, whereas the first bond bound him only *de bonis testatoris*. 3 Lev. 55. Mich. 33 Car. 2. C. B. Lobly v. Gildart.

26. A bond was given as an *accumulative security* for payment of a sum decreed. This bond shall not go in discharge or satisfaction of any subsequent debt. Fin. Rep. 296. Pasch. 29 Car. 2. Whitton v. Searl.

27. Executor of an obligee accepted a note on a goldsmith for the money; the goldsmith accepted the bill, and before payment fails; the executor afterwards brought action on the bond, and this matter being given in evidence was adjudged a good payment; cited per Jefferies C. to have been adjudged in Ch. J. Pemberton's time. Vern. 474. pl. 463. Mich. 1687.

28. In debt on bond conditioned for payment of 12 l. at a certain day, the defendant pleaded, that after the day he paid 8 l. and then the defendant and one J. S. gave another bond conditioned for payment of 10 l. which the plaintiff accepted in full satisfaction. It was adjudg'd ill; for admitting one bond may be given in satisfaction of another, yet here the first obligation was forfeited, and the whole penalty due in law, and in such case acceptance of a less sum cannot be satisfaction for a greater. Lutw. 464. Mich. 3 Jac. 2. Geang v. Swain.

29. In debt on bond, the defendant pleaded that the plaintiff, after the day, did accept a second obligation in satisfaction and discharge of the sum in the condition of the former. Judgment was given for the plaintiff per tot. Cur. though no exception was taken to the plea, for want of alleging that the second obligation was given in satisfaction, &c. but only that the plaintiff accepted it in satisfaction and discharge, &c. Lutw. 501. Mich. 3 W. & M. Girle v. Field.

30. One on the marriage of his daughter gives a bond to the husband for the daughter's portion, and afterwards by will devises land of much greater value to the husband and the wife, and their heirs. The devise is no satisfaction of the bond, though there be a defect of assets to pay the testator's debts. 2 Vern. 298. Trin. 1693. Goodfellow v. Burchett.

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S. P. per
Cur. 8ty.

319, 340.

Trin. 1652. Brock v. Vernon. — A bond is no satisfaction of money due, though it may be of money before it is due. 12 Mod. 86. Mich. 7 W. 3. Stayney v. Baker.

31. One bond cannot be a satisfaction for another. Litt. Rep. 58 Ene's case.

32. Debt upon several *assumpsits*; defendant pleads, that he had given a bond for the same, and on demurrer judgment for the defendant. 12 Mod. 406. Trin. 12 W. 3. King v. Woolaston.

33. Debt upon a bond; the plaintiff did by his deed grant and agree to, and with the defendant, to accept a bond for the building of a house, in satisfaction of the first bond, and now it was held not to be a good plea, for it amounts to no more than a covenant, and not to a release. 12 Mod. 539. Trin. 13 W. 3. Baber v. Palmer.

34. Holt

34. Holt Ch. J. said, that a *bond* may be a satisfaction of the condition of another bond before it is forfeited; otherwise after. 12 Mod. 539. Trin. 13 W. 3. Baber v. Palmer.

35. In debt upon bond the defendant pleaded in bar, that he made a feoffment to the plaintiff of lands, and that the plaintiff accepted thereof in satisfaction, and seems admitted for a good plea; but per Cur. the acceptance must be laid where the feoffment was made, it being local. 6 Mod. 82. Mich. 2 Ann. B. R. Williams v. Farrow.

36. A. covenants on his marriage to purchase lands of 200 l. a year, and settle them for the jointure of his wife, and to the first, &c. sons of the marriage. He purchases lands of that value, but makes no settlement, and on his death the lands descend to his eldest son. On a bill by the son for a specific performance, decreed the lands descended to be a satisfaction of the covenant. '2 Vern. 558. Trin. 1706. Wilcocks v. Wilcocks.

S. C. cited by Sir Joseph Jekyll, master of the Rolls, and says, the book takes notice, that the lands were worth 200 l.

per annum, which imports, that they were just of that value, and this plainly shews, that the lands were brought with an intention to satisfy the covenant, and the eldest son could not complain, or object, when he had his 200 l. per annum from his father, that it was another estate than what was covenanted to be settled upon him, viz. that it was a fee simple instead of an entail, for which cause this seems to have been a reasonable decree. 3 Wms's Rep. 225, 226. Mich. 1733.

37. W. devised a leasehold estate to M. chargeable with 10 l. a year to A. for life. Afterwards M. by will made J. S. executor, and devised also 10 l. a year to A. for life. J. S. being afterwards seised in fee of other lands, settled his estate on himself for life, remainder over, &c. Remainder to trustees for 99 years, to pay his debts and legacies, and afterwards that A. should have and receive 20 l. a year for life; the remainder vested in the trustees. Ld. Chancellor agreed the gifts by the will to be good, and that where a man is debtor in 10 l. and gives 20 l. it shall be a satisfaction, and not a legacy, and that he believed, in his own private opinion, that the 20 l. a year annuity was intended for a satisfaction, and that (as Mr. Dolbin had said) there was no case like this in point. Gilb. Equ. Rep. 65. Pasch. 7 Ann. in Canc. Davison v. Goddard.

38. Sir William Davie had an estate in Somersetshire by his first lady, which was to her in tail; they levy a fine, and declare the uses to them, and the issue of their body, remainder to Sir William and his heirs; they have a daughter Mary, and the feme dies. On this marriage there were articles, that Sir William should leave his daughter 2500 l. if the trustees demanded it within one year after his death, &c. Sir Jo. the father of Sir William was then living. Sir William marries a second wife, and by her had issue several daughters. By deed executed in his life-time he gives the estate in Somersetshire to Mary and her heirs, and by deed also charges his lands in Devonshire which he had purchased with 5000 l. a-piece to the three daughters, and dies. Mary demands the 2500 l. and interest; but to this it was objected, that the gift of the Somersetshire estate was an equivalent, or the reversion of the lands in Devonshire was esteemed to be such, and that Sir William often declared, that he would leave all his children equal, and amongst his debts, of which there was a list of his own hand writing, this 2500 l. was not mentioned;

mentioned; but decreed by lord keeper Harcourt, that Mary should have the 2500 l. with interest from Sir William's death, at 5 l. per cent. That the *Somersetshire estate* could not be an equivalent, because it mov'd from her mother, and was the condition of the agreement for the 2500 l. That the reversion of the lands in *Devonshire* could not be so, because Sir William's father was then living, and there was no respect had to these reversions, neither were they then in being, and to make it an equivalent, it ought to be in being, and in view at the time of giving the equivalent. Mich. 9 Ann. Canc.

39. Bill to have a performance of a marriage agreement contained in a condition of a bond, viz. that the husband should purchase lands of the value of 800 l. to be settled upon himself for life, remainder to his wife for life, remainder to the heirs male of the husband begotten on the body of the wife, remainder to the right heirs of the husband, &c. The eldest son of the marriage brings this bill against the executors of his father to have the benefit of this agreement. The defendant insists, that the father in his life-time purchased a copyhold estate which descended to the plaintiff, and likewise by his will devised 100 l. legacy to be raised out of land to the plaintiff, and that this copyhold and legacy shall be taken as a satisfaction of the marriage agreement, especially in this case where the husband and wife were tenants in tail and might bar the issue. Harcourt C. decreed the plaintiff must have a satisfaction of the agreement in the bond, and 4 l. per cent. allowed him for interest of the 800 l. from the death of his father; that the copyhold estate descended to him, from his father, must be taken as a satisfaction pro tanto of the agreement, according to the value of the land and the purchase money, but the legacy of 100 l. being devised out of land is not to be taken in part of the satisfaction; and as to a conveyance made of 6 acres said to be made by the father to the plaintiff in his life-time, to inquire whether it was a voluntary conveyance, and then to go pro tanto in satisfaction of the agreement; but if the purchase money was paid to the father, then to be no part of the satisfaction. MS. Rep. Trin. 12 Ann. Canc. Wilks v. Wilks.

40. H. being seised in tail of some lands with remainder over, and also seised for life of other lands, with a power to make a jointure in bar of dower, with remainder over, &c. during his minority, in consideration of a marriage to be had with the daughter of U. and 1000 l. paid down, and 3000 l. more to be paid by U. to H. at his age of 21, doth covenant by his guardian to settle a jointure of 500 l. per annum, when he comes of age, upon his intended wife. The marriage took effect, and afterwards U. the plaintiff's father, pays H. the 3000 l. residue of the portion, when he came of full age, and then H. in pursuance of the covenant entered into by his guardian, doth settle a jointure of 500 l. per annum upon his wife the plaintiff. Some years after H. makes his wife an additional jointure of 250 l. per annum upon her father's dying, and leaving her the value of 9000 l. and at the same time persuades his wife to join with him in a fine of all the residue of his estate. Afterwards H. dies, and by his will devises a house and lands to his wife for her life, to the value of 270 l. and gives her a legacy of 4000 l. and his plate and jewels, to the value of 2000 l. more, and makes her executrix, and gives her the moiety

maisty of the residue of his personal estate, &c. It happened that the jointure, made pursuant to the marriage articles, *proved defective both in title and value*, and thereupon she brought a bill against the remainder-man, to have a satisfaction out of the real estate for the deficiency of her jointure, &c. [294]

There were two principal points in this case.

1st. *If the additional jointure, being a voluntary settlement after marriage, should go in satisfaction pro tanto of the jointure made pursuant to the marriage articles.*

2dly, *If the 270 l. per annum, devised to her for life, should go in satisfaction of the marriage articles, or if the legacies left her by the will should be deemed a full satisfaction.*

Harcourt C. was of opinion, that the additional jointure of 250 l. per annum shall not go in part of satisfaction of the marriage agreement, which, though made by the guardian, did bind H. as strongly as if he had been of full age, and had signed the articles himself, especially since H. at his full age did receive the 3000 l. residue of his wife's portion, and did actually make a jointure of 500 l. per annum to his wife in pursuance of those articles. Now when he settled the additional jointure of 250 l. per annum upon his wife, he could not intend it in satisfaction pro tanto of 500 l. per annum, because before that time he had made her a jointure of 500 l. per annum, pursuant to the marriage articles, which he then thought to be a good settlement, and therefore there is no room left for the presumption in equity, that a voluntary settlement shall be intended in satisfaction of a precedent covenant or agreement, though not made in pursuance of it; and so as to the devise of 270 l. per annum for her life, and the 4000 l. legacy, &c. they cannot be intended by H. in satisfaction of the jointure by the marriage articles, but given to her as a bounty by her husband, because at that time he thought his wife's jointure was well settled and secured; besides *money or personal estate shall never be deemed in equity a satisfaction for a freehold.*

And decreed, that the remainder-man do settle 500 l. per annum upon the plaintiff for life, out of the lands which came to him upon the death of H. and that the lands contained in the additional jointure, or devised to the plaintiff, shall not come in aid of the other lands pro rata to make a satisfaction for the marriage articles, but *the whole 500 l. per annum shall entirely come out of the other lands in remainder, notwithstanding the fine levied by H. and his wife the now plaintiff of those lands*, though that be a bar and estoppel of her dower at common law. And that the plaintiff have a satisfaction for the said 500 l. per annum from the time of the death of her husband H. His lordship did also direct the defendant to account for the rents and profits of the additional jointure of 250 l. per annum from the death of H. But the counsel for the defendant moved, that the additional jointure was made out of the lands of which H. was only tenant for life, with a power to make a jointure, &c. and that the power was not well executed at law, and being a voluntary settlement, if the power was not well executed, it ought not to be aided in equity; to which lord C. said, he saw no reason why a defective execution of a power for the benefit of

the wife, though otherwise provided for, should not be aided in a court of equity, as well as want of a surrender of a copyhold in case of a devise to a child, who hath another provision by the will, but since it was insisted on, that there is no precedent in this court, of supplying a defective execution of a power in case of a voluntary settlement, he gave leave to try the validity of the execution of the power at common law, and retained the bill quoad that part until it be determined at law. Decree affirm'd in Dom' Procer'. MS. Rep. Mich. 12 Ann. Canc. *Lady Hooke v. Grove & al'*.

[295] 41. One covenants *to leave his wife 650 l.* He dies intestate, and the *wife's share on the statute of distributions comes to more than the 650 l.* this is a satisfaction. 2 Vern. 709. pl. 631. Hill. 1715. *Blandy v. Widmore.*

42. A. by marriage articles is bound *to pay his wife, if she survives him 1500 l. in full of dower*, thirds, custom of London, or otherwise, out of his real and personal estate. A. dies intestate, this bars the wife of her share by the statute of distributions. 2 Vern. 724. Mich. 1716, *Davila v. Davila.*

10 Mod. 438. 439. S. C. 43. A. having two sons, E. and H. has a design to disinherit the eldest, and to that purpose gives an estate to the youngest, and thereupon he marries and obtains a considerable fortune; but the eldest contrives, (by insinuating as if the father had commanded it) that he should give a bond to leave 3000 l. to one of the children of the eldest. The bond was dated in 1668. H. makes his will, and takes notice of this bond, and declares that he would never pay it as a debt, but gives an estate in land to these children, &c. The questions were, 1st, Whether the court would not damn this bond? 2dly, Whether, considering the length of time, and here being a devise, this shall not be taken as a satisfaction, &c. And lord C. Parker chose rather to make his decree on the latter, and the matter was directed to enquire into the value of this estate so given. An estate for life is no compensation for a sum, because of the uncertainty of its duration. The satisfaction ariseth according to the declaration of the party; the presumption is always in favour of the satisfaction, unless the intent of the party appear to be otherwise, which must come on that party who would not have it to be a satisfaction. Trin. 5 Geo. Canc. *Hancock v. Hancock.*

the direction of A. and told him, that unless he would execute it, A. would not suffer the match to proceed; and moreover, that he must not so much as mention any thing relating to this bond, as he valued his father's displeasure. The condition of this bond was, that if he should die without issue by that marriage, he would leave 3000 l. to one or more of the children of B. who had married the daughter of D. Under this terror C. executes the bond. Afterwards he spoke to his father of it, who denied that he ever gave such directions, and gave him 3000 l. to indemnify him against the bond, which 3000 l. was, when this bond should be delivered up to him, to be distributed among the grandchildren. A dies. C. in his life-time, and by his will, gave in land and money more than 3000 l. to one of the children of B. and dies without issue. The only evidence of the manner by which this bond was extorted, was a recital in the will of C. It was prov'd in the cause, that when C. was making these gifts in the favour of B's son, he was advised to declare, that this was in satisfaction of the bond; but his answer was, that this would look like complying with a bond which he had all along declared had been unjustly extorted from him. This bond was of 50 years standing. Ld. C. Parker said, he made no doubt but this bond was fraudulently extorted, but knew not how to come at it; for to allow a recital in the will of the obligor, as evidence to overthrow a bond, may be of dangerous consequence; however, he thought the bond had been satisfied, and the reason given why he would not declare it to be in satisfaction, does very plainly amount to a declaration of his intention, that he did not design to make the gifts he did over and above the satisfying his bond.

44. In a settlement a term was raised for daughter's portion, (viz.) 10,000 l. with a proviso, that if the father by deed or will should give, or leave the sum of 10,000 l. to his said daughters, it should be a satisfaction. The father leaves land to the daughters of the value of 10,000 l. this is no satisfaction. 3 Wms's Rep. 245. Patch. 1734. Chaplin v. Chaplin.

(E. d. 2) Where the *Acceptance* of the like, or a [296] lesser Sum, or Estate, shall be a good Barr.

1. **I**N debt upon obligation, where a man is bound in 200 l. to Br. Dett. pay 100 l. at a day, and he pays it after the day, and the plaintiff accepts it, yet the obligation is forfeited; but if a man be bound upon condition to pay at such a place, and he pays it at another place, this is good by the acceptance of the plaintiff, note a diversity, Br. Conditions, pl. 31. cites 46 E. 3. 29.

a statute merchant with defeasance to pay 40 l. to C. such a day, if he pays it elsewhere at the day or before the day it suffices. Br. Conditions, pl. 48. cites 21 E. 3. 45.

2. *Acceptance of land to the value of 10 l. per ann. where it ought to be 20 l. per ann.* is no discharge of the bond in which he is bound to make estate of 20 l. land per ann. Br. Acceptance, pl. 12. cites 3 H. 7. 4.

3. Where the condition is for payment of 20 l. the obligor or feoffor can't at the time appointed pay a lesser sum in satisfaction for the whole, because 'tis apparent that a lesser sum of money can't be a satisfaction of a greater. Co. Litt. 212. b.

302. S. P. accordingly, by Crew Ch. J. and by Doderidge J. tho' 20 l. cannot be paid in satisfaction of a greater, as for instance, of 200 l. in the principal case there, yet 20 l. may well be paid to end a suit for 200 l. and this may well be so done by law, and judgment was given for the plaintiff accordingly by the opinion of the whole court. Mich. 1 Car. B. R. — 5 Rep. 117. a. Trin. 44 Eliz. C. B. Pinnell's case, S. P. adjudged accordingly. — Mo. 677. pl. 923. Penny v. Core, S. C. held accordingly.

4. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole it is sufficient, by reason the deed amounts to an acquittance of the whole. Co. Litt. 212. b.

sum, but this is by reason of the writing, for if it was without writing then the payment of part could not be a satisfaction for the whole, as Bendlova said was lately argued and adjudged. Mo. 47. pl. 142. Patch. 5. Eliz. Anon.

5. If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receives it, this is a good satisfaction. Co. Litt. 212. b.

the S. P. held accordingly. — D. 1. Marg. pl. 3, cites S. P. Per Periam v. Anderson, and 18 E. 4. 15. 17. 20. — 5 Rep. 117. a. b. Trin. 44 Eliz. C. B. Pinnell's case, S. P. adjudged accordingly; but then he must not plead generally that the plaintiff accepted it in full satisfaction, but also that he paid it in full satisfaction; for the manner of payment is to be directed by him who makes it, and not by him who accepts it, and judgment was given accordingly. — 5 Mod. 86. cites S. C.

6. A bond

Mo. 677.

pl. 923.

Penny v.

Core, S. C.

the court

thought the

plea good,

because the

acceptance

was before

the day,

but payment

of part at the

day and place

cannot be, by

acceptance, a

satisfaction of

all of the same

kind. — And

5 Rep. 117. a.

the court resolved

that the payment

and acceptance

before the day

of parcel in

satisfaction of

the whole shall

be a good satisfaction

in respect of the

circumstance of

the time; for

perhaps parcel

of it before the

day will be more

beneficial to him

than the whole

at the day, and

the value of the

satisfaction is

not material. But

judgment was

given for the

plaintiff for

the insufficient

pleading.

* [297]

6. A bond to pay 8 l. 10 s. 11 Nov. 1600. In debt, defendant pleads that he at the plaintiff's request before the day, viz. 1 Octob. paid 5 l. 2 s. 2 d. which plaintiff accepted in full of satisfaction of the 8 l. 10 s. judgment for the plaintiff on the defendant's plea for he doth not plead that he paid the money in full satisfaction as he ought, but pleads payment generally, and that the plaintiff accepted it in full satisfaction. 5 Rep. 117. Trin. 44 Eliz. C. B. Pinnell's case.

But payment of part at the day and place cannot be, by acceptance, a satisfaction of all of the same kind. — And 5 Rep. 117. a. the court resolved that the payment and acceptance before the day of parcel in satisfaction of the whole shall be a good satisfaction in respect of the circumstance of the time; for perhaps parcel of it before the day will be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. But judgment was given for the plaintiff for the insufficient pleading.

* [297]

7. An executor brought debt upon several bonds made to the testator, the defendant pleaded that he paid a lesser sum than expressed in the bonds to the testator in his life-time, and that he did accept the same in full satisfaction of the said bonds; upon demurrer the question was, whether the payment or the acceptance of the money should be traversed. Roll. Ch. J. held it indifferent to traverse either, but that it was more to take issue upon the payment, but the court would advise. Sty. 239. Mich. 1650. Bois v. Cranfield.

8. Payment of a lesser sum in satisfaction of a greater is good in assumpsit, but in debt upon obligation the defendant pleaded in abatement that the plaintiff received part of the money after the action brought, and ruled ill. Comb. 19. Pasch. 2 Jac. 2. B. R. Hilliard v. Smith.

(F. d) By whom the Collateral Thing being given, it shall be a good Satisfaction.

Cro. E. 541.

pl. 6. S. C.

held by

Popham and

Cawdy,

ceteris justiciariis

absentibus,

that it is not a

good plea, for

he is in no

fort privy to

the condition,

and afterwards

adjudged,

per Popham

and Clench

(ceteris

absentibus)

for the plaintiff.

[1.] If the condition of an obligation be to pay 20 l. at a day, and a stranger surrenders a copyhold to the use of the obligee in satisfaction of the 20 l. which the obligee accepts; this is a good satisfaction and discharge of the obligation. Trin. 39 Eliz. B. R. between Grimes and Blofield.]

per Popham and Clench (ceteris absentibus) for the plaintiff.

(F. d. 2) Pleadings as to Acceptance of Collateral Things.

1. Defendant pleaded that plaintiff accepted wares in full satisfaction, &c. of the residue of the debt (upon bond) but upon demurrer it was adjudged ill, because he did not plead that he gave the wares in full satisfaction, but only that the plaintiff accepted them in full satisfaction, which can't be, unless the defendant gave

gave them for that purpose. Carth. 237, 238. Pasch. W. & M. in B. R. Frederick v. Gosfricht.

2. And so likewise must the acceptance be pleaded in satisfaction. Carth. 347. 348. Pasch. 7 W. 3. B. R. Young v. Rudd.

In a bill in chancery, the plaintiff set forth an agreement for purchasing stocks of the defendant at so much, and that he paid 6 d. as earnest; the defendant pleaded, that he did not accept or receive it as earnest; per lord C. King, this is not well pleaded; for it is not material how or in what manner the plaintiff received or accepted it, but how the other paid it; for *quicquid solvitur, solvitur ad modum solventis*, and cited 5 Rep. 117. Pinnel's case, and so over ruled the plea. Mich. 1725. Wms's. Rep. 304. 308. Colt v. Nettervill.

(G. d) In what Cases the Dispensation or Extinguishment of Part of the Condition shall be of the Whole. [298]

See Tit. Apportionment, per totum.

[1. IF a man leases for years upon condition that the lessee or his assigns shall not alien without licence of the lessor, and after the lessor licences the lessee to alien to whom he pleases, who after aliens to J. S. The condition is quite gone by this licence, for by the dispensation to the lessee, the condition is utterly discharged, as to the assignees. Co. 4. * *Dumper against Sims* 119. b. Pasch. 43 Eliz. B. R. adjudged; for a condition is to be taken strictly, and by his alienation with licence, the condition is satisfied. M. 3 Jac. B. between † *Walker and Bellamy*, adjudged.]

* Cro. E. 315. pl. 5. S. C. adjudged accordingly, for it cannot be discharged for a time and in esse again afterwards.

† Cro. J. 102. pl. 36. S. C. but S. P. does not appear.

[2. [So] if a man leases land upon condition that he shall not alien the land, nor any part thereof, without the assent of the lessor, and after he aliens part with the assent of the lessor; he may after alien the residue without his assent, for all the condition is gone by this, for it cannot be divided or apportioned. Co. 4. *Dumper's case*, contra, D. 16. Eliz. 334. 32. adjudged.]

S. P. by Popham Ch. J. 4 Rep. 120. a. in *Dumper's case*, and he denied the case in Dyer, and

said that he thought the said case in Dyer to be falsely printed, for he held it clear that it was not law. — Cro. E. 816. S. C. and held by Popham accordingly. — Mo. 205. Arg. cites the case of 16 Eliz. D. 334. but says, that if any part of the land shall be discharged of the condition all is gone, but that it is not so where the person is discharged of parcel of the labour which sounds to his case; but *Anderfon and Rhodes* e contra in this point, and yet both agreed with him, that if a subject has a reversion to which a condition is incident, and grants over parcel of the reversion, or purchases by surrender parcel of the land, the condition is gone for the whole; for so it was adjudged in one *Winter's case* and in *Somerford's case* in Hill. Term Hill. 27 Eliz. — Where one has an intire condition he cannot by his own act divide it, but by act of law it may be divided, as by recovery in waste, or descent of part of the reversion in gavelkind or borough English, but not by grant of the person himself; per Cur. Mo. 98. pl. 241. Trin. 14 Eliz. — S. P. by Roll. Ch. J. Sty. 317. Hill. 1651. — S. C. cited Arg. Raym. 287. ad finem. and ibid. 288. cites 14 Car. 2. *Gardiner's case*, that in such case the condition is gone even in the queen's case.

[3. If a man be bound to build an house, and the obligor discharges one post, he is discharged of the whole. 4 H. 7. 6. b. per Keble.]

[4. If a man be bound to go with A. C. and D. and the obligor discharges him from [going with] D. he is discharged by this from going with A. and C. though that which discharged is for advantage, for the condition is entire. Contra, 4 H. 7. 6. b. per Brian.]

Mo. 205. [5. So if the condition be to plough my land in such a town and
per Periam I discharge him of parcel; this also discharges the rest. Contra, 4
J. Arg. cites S. C. that H. 7. 6. b. per Brian.]
though I discharge him of plowing one or two acres, yet he shall plough the residue.

[6. If a man hath a power of revocation, and he by his own act
extinguishes his power of revocation in part, as by levying a fine of
part; yet the power of revocation remains for the residue, because
this is in nature of a limitation and not of a condition. Co. Litt. 215.
Fol. 472. cites the earl of Shrewsbury's case in curia wardorum, Pasch. 39
Eliz. & Mich. 40 & 41 Eliz. resolved.]

[299] [7. If A. leases land to three upon condition, that they, or any of
Godb. 93. them, shall not alien without licence of the lessor; and after one aliens
pl. 104. S. C. the lessor with the licence of the lessor, this discharges all the condition as to
made a licence that the other two also. Trin. 28 Eliz. B. between Leeds and Crompton,
A. B. or C. adjudged; cited Co. 4. 120.]

[who were the three lessees] might alien; this is a good licence notwithstanding the uncertainty, and thereby
they have several authorities to alien.——4 Le. 58. pl. 146. Lees v. lord Stafford, S. C. adjudged for
the lessee who aliened by virtue of this licence.——S. C. cited Noy 32. that the lessor licenced A. to
alien his part, and afterwards B. and C. aliened without licence, and that the entry of the lessor was
adjudged not lawful because the condition was entire; and cites 4 H. 7. 9. & S. P. but the reporter
says, quære if they had made partition by consent before that licence.——S. C. cited by the name
of Lyds v. Crompton, Cro. E. 816. that it was adjudged that the lessor did not enter; for the con-
dition was dispensed with before.

[8. If the owner of a ship covenants with B. that he will receive
such lading as he shall appoint at York by such a day, and then to go
with the first wind to R. and there to unload and take in other wares;
and after B. discharges him from taking in goods at Y. but that he shall
receive his lading at R. This discharge of parcel of the covenant
is not any discharge of the residue. Trin. 11 Jac. B. between Smith
and Barnes, per Curiam, for these are several.]

Br. Con- 9. In contract of 20 l. the taking of a bond for 10 l. thereof de-
tract, pl. 8. termines the whole contract, and the issue taken there was, that it
cites S. C. was for another cause. Br. Obligation, pl. 21. cites 3 H. 4. 17.
—S. P. But a Bond
cannot determine debt of record, or by specialty, as bond upon bond, or bond of debt due by account
before auditors. Br. Obligation, pl. 23. cites 11 H. 4. 79.

10. If a man makes a lease for life of 2 acres upon condition, and
after the condition is broken, the lessor may enter into one acre
only and waive the benefit of the other acre, and yet the condition
is entire; per Cottelmore. Co. R. on fines, 13. cites 1 H. 6. 4.

11. Three parceners are, and the one enters and leases to me ren-
dering rent, and I am bound to pay the rent, and after the two enter;
I forfeit the obligation if I do not pay the 3d part of the rent, but
by the entry two parts of the rent are extinct. Br. Conditions, pl.
207. cites 20 H. 6. 23.

Br. Dette 12. Debt upon a bond for payment of rent reserved upon a lease
pl. 178. cites for years made by the plaintiff to the defendant, the defendant said that,
S. C. before that the plaintiff any thing had, J. N. was seised, and had if-
sue the plaintiff and two other daughters, and died; and the plaintiff
entred into all and leased to the defendant rendering the rent, and he
was

was bound to pay it; and before any day of payment the two other daughters entred judgment *fi actio*. And the best opinion was, because by the entry into two parts the rent shall be apportioned, and the defendant has not paid the third part according to it, therefore the obligation is forfeited. Br. Obligation, pl. 6. cites 20 H. 6. 23.

13. For a bond cannot be apportioned; for where he is bound in 10l. to pay 4l. and he pays 3l. and not 4l. the bond is forfeited. Ibid.

14. Brook says it seems there, that if the entry had defeated the estate of the plaintiff in the whole, that then the bond had been discharged in all. Ibid.

15. If A. infeoffs B. upon condition, &c. to re-enter, there if a man impleads B. who vouches A. and so recovers, or if A. re-enters upon B. without cause, and is impleaded and loses, there, in the one case and the other, the condition is determined; for the land is recovered against him who made the condition. Br. Judgment, pl. 136. cites 26 H. 8.

16. If a man leases land for life, or years, rendering rent with clause of re-entry, if the lessor enter into any part of the land he cannot re-enter for the rent again afterwards, by reason that condition * cannot be apportioned nor the rent. Br. Conditions, pl. 193. cites 33 H. 8. and P. 9. E. 4. 1.

*[300]
S. P. For
condition
cannot be
apportion-
ed nor di-
vided. Br.

Extinguishment, pl. 49. cites 33 H. 8.

17. Feoffment to two upon condition to make an estate back to the feoffor for term of life, the remainder over in fee to a stranger; one of the feoffees makes an estate accordingly; it seemed to several, that this is good for the moiety, because the party to the condition hath dispensed with the condition by the acceptance of the estate. Dy. 69. b. 70. a. pl. 36. Pasch. 5 E. 6. Anon.

18. Lessee for years has execution, by elegit of a moiety of the rent and reversion, against the lessor where the lease was upon condition. This is a suspension of all the condition during the time of the extent; and though only a moiety of the rent was extended, yet the entire condition was suspended, for it cannot be apportioned; per Curiam. Mo. 22. pl. 75. Pasch. 2 Eliz. Anon.

Le. 201. pl.
322. in
times of
queen Eliz.
S. P. where
debt was
recovered
against the
lessor, it

was held, that the moiety of the rent and the reversion was extendable by elegit, and upon such extent the condition is suspended during the extent, as well in the lessor as in the party who has the extent.

19. If lessor recovers part of the land in an action of waste, or enters for forfeiture into part for an alienation in fee, the condition remains, as Manwood conceived. 4 Le. 29. in pl. 82.

S. P. by
the justices,
Mo. 98.
pl. 241.
Trin. 14

Eliz. and seems to be S. C. — S. P. per Periam J. Mo. 203. Pasch. 27 Eliz. — Mo. 114. pl. 255. Pasch. 20 Eliz. S. P. obiter, by Dyer and Manwood.

20. A parson leased land, whereof he is seised in his own right, and land whereof he is seised in the right of his church, for years, rendering rent, with clause of re-entry, and dieth; the rent shall go according to his respective capacity, and the condition divided. Per Jefferies. 4 Le. 28. in pl. 82.

21. So

Mo. 203. in pl. 349. Paſch. 27 Eliz. S. P. by Periam J. 21. So if part of the land ſo demifed be *evicted*, the rent ſhall be apportioned, and the condition alſo. Per Jefferies. 4 Le. 28. in pl. 82.

22. A man makes a leaſe for years, rendering rent, with claufe of re-entry, takes a wife and dies; the wife recovers the 3d part of the land demifed for her dower, now that 3d part is diſcharged of the condition during the eſtate in dower, but the reſidue is ſubject to the condition; per Mounſon J. 4 Le. 28. in pl. 82.

S. P. agreed, 23. Where one has entire condition, he cannot by his own act divide it, but by act of law it may be divided; as by recovery in waſte, or deſcent of part of the reverſion in gavelkind or borough Engliſh, but not by grant of the perſon himſelf. Mo. 97, 98. pl. 241. Trin. 14 Eliz. Appowell v. Monoux.

309. pl. 75. in Winter's caſe. — Geddb. 3. Paſch. 20 Eliz. C. B. S. P. — Mo. 98. pl. 241. Trin. 14 Eliz. at the end of the caſe of Appowell v. Monoux. — Co. Litt. 215. a. S. P.

24. A. termor for 20 years, and ſeiſed in other lands in fee, leaſes all for 10 years, reſerving rent, with claufe of re-entry, and dies; now the heir has a reverſion for the land in fee, and the executor for the other land, ſo the condition is divided according to the reverſion. 4 Le. 27. pl. 82. per Manwood.

[301] 25. A. has a general tail in Bl. Acre, and ſpecial tail in Gr. Acre, and leaſes both, rendering rent, and dies having ſeveral iſſues inheritable to each tail; now the condition ſhall go according to the rent; per Manwood. 4 Le. 27. pl. 82.

S. P. accordingly, by Dyer and Manwood. Mo. 214. in pl. 255. Paſch. 20 Eliz. — S. P. by Periam. Goldſb. 21. — S. P. by Jefferies, 4 Le. 28. in pl. 82.

26. If leſſor accepts ſurrender of part, the entire condition is gone, for 'tis his own act, per Periam J. Mo. 203. pl. 349. Paſch. 27 Eliz.

If 2 jointers make a leaſe for years reſerving rent upon condition, and after they 27. Two coparceners of a reverſion with condition, make partition by agreement, the condition is gone. Mo. 203. per Periam J. ſays it was ſo adjudged 4 & 5 Phil. & Mary. But if by writ the condition remains; per Anderſon Ch. J. Mo. 205, 206. in pl. 349. Paſch. 27 Eliz.

make partition (as they well may, having the reverſion and freehold in them) neither the one nor the other ſhall enter for the condition broken. Per Rodes J. Goldſb. 22. Trin. 28 Eliz.

28. A condition is an entire thing, and cannot be divided; as if I leaſe 3 acres for years, with a condition of re-entry for non-payment of rent, and then I grant the reverſion of 2 acres, the condition is deſtroy'd, for it is entire, and againſt common right; but in the king's caſe the condition is not deſtroy'd, but remains ſtill in the king. Co. Litt. 215. a.

Co. Litt. 215. a. S. P. — Mo. 203. S. P. by Periam. — 29. So a condition may be apportioned by the act or tort of the leſſee; as if a leſſee makes a feoffment of part, and the leſſor enters for the forfeiture; or recovers the place waſted, the rent and condition ſhall be apportioned; for the leſſor ſhall not be prejudiced by the

the act of the lessee, and no one shall take advantage of his own wrong. 4 Rep. 120. b. Hill. 45 Eliz. B. R. Dumpor's case, alias Dumpor v. Symms. S. P. Arg. Roll. Rep. 331. at the end of pl. 37.

30. [A condition may be *extinguished as to one, and in esse as to another*] as where tenant for life of a rent acknowledged a statute, and releases to the tertenant, the statute is forfeited, it was held that the rent *as to* the conusee was in esse, per Coke and 2 other justices. 4 Le. 235. pl. 370. Mich. 5 Jac. C. B. Anon. 4 Le. 239. pl. 386. S. P. by Coke Ch. J. in C. B. in Duncomb's case, and seems to be S. C.

31. If lessor grants reversion of part of the land, all the condition is destroy'd. 2 Roll. R. 332, 333. Trin. 21 Jac. B. R. Anon. S. P. per Periam J. Mo. 203. in pl. 349. —D. 309. a. pl. 75. in Winter's case, S. P. —S. C. cited per Cur. and admitted. —Godb. 336. in pl. 431. Trin. 21 Jac. B. R. —S. P. Arg. Goldsb. 114. pl. 6. Mich. 39 & 40 Eliz. Co. Litt. 215. a. S. P.

32. *Covenant to levy a fine to the use of himself and wife for life, and afterwards made a lease of the lands for 21 years, rendering rent every half year, and after the death of J. S. to pay a fine of 125 l. by 5 l. per ann. quarterly; proviso, that if the rent or fine is not paid, it shall be lawful for the lessor to re-enter. Afterwards he levied a fine, and then assigned over the reversion. It was objected that the condition, as it respects the fine of 125 l. is a condition in gross, and not incident to the reversion, and so not transferred by the assignment, but that the condition as to the rent is transferred; but Roll. Ch. J. said that a man cannot by his own act divide a condition which goes in destruction of an estate, and by assigning over the reversion the whole condition is gone; and this is not within the statute of 32 H. 8. to which all the justices agreed. Sty. 316. Hill. 1651. Dekins v. Latham.*

33. Where the condition runs with the rent, if the rent is gone [302] the condition is gone. See Tit. Reservation [N] pl. 6. and the notes there.

(G. d. 2) What shall be a Suspension.

1. *TENANT in tail made a feoffment in fee, and retook estate in fee, and after was bound in a statute-merchant, and then made a feoffment in fee upon condition, and died; the issue in tail within age enters for the condition broken, and was remitted by his nonage. Per Keeble, the execution of the statute was sued against the father of the issue in his life, which execution is not yet incurred, therefore the condition was and is suspended during the execution; for he who may make a condition may suspend or discharge it, and this is as a grant to discharge the land of the condition during this time by the equity of the statute of anno 1 R. 3. For the father might have released the condition, or * if he had taken a lease for years after, and had granted it over, there, during this lease, the condition had been suspended. But Rede contra. But Brook says, it seems,* S. P. per Keeble. Br. Conditions. pl. 249. cites 11 H. 7. 21.



Condition.

seems, the law is with Keble, and not denied but that a condition may be suspended. Br. Conditions, pl. 134. cites 8 H. 7. 7.

2. In Trespass. *Tenant in tail discontinues upon condition, and after is bound in a statute-merchant, and the conusee has execution; the tenant in tail dies; the condition was performed in the life of the feoffor.* The issue in tail may enter, and the condition is not suspended by the execution, per Brian Ch. J. and his companions; but Brook says quod mirum! because it seems that the execution suspends the condition, and also the tail is discontinued; and then if the heir does not recover by formedon, or otherwise be remitted, the heir cannot enter. Br. Conditions, pl. 249. cites 11 H. 7. 21.

Mo. 71. pl.
193. Trin.
6 Eliz.

Anon. S. P.
and seems

3. *By extent on a recognizance of the moiety of the rent and reversion a condition of re-entry is suspended; cited by Mead to be the opinion of the court.* 6 Eliz. 4 Le. 28.

to be the case intended, and there agreed, and that if the rent be arrear he cannot enter into the other moiety.—Dal. 72. pl. 50. 6 Eliz. 8. C.—The condition is suspended for the whole, though only a moiety of the rent is extended; for condition cannot be suspended for part and in esse for part. Mo. 97. pl. 225. Trin. 10. Eliz.—S. P. held, that the condition is suspended during the extent, as well in the lessor as in the extendor. 4 Le. 201. pl. 322. in time of queen Eliz.

4. A. makes a lease to a man and feme sole, rendring rent with clause of re-entry, and afterwards the lessor intermarries with the feme, the condition is suspended. Per Mead 4 Le. 28.

5. When a condition is suspended in part, it is suspended in all. A. leases for years on condition, and afterwards lessor confirms his estate in part of the land for life, the condition is gone. Per Harper, 4 Le. 29, 30.

Co. Litt.

215 a. 8. P.

6. Lease was made of land, part borough English and part at common law by licence of the lord, upon condition, that if, &c. afterwards reversion of part descends to the eldest, and of the other part to the youngest son. Per 2 justices, the law which has severed the reversion has severed also the condition; and where one purchased the part of the other, he shall have advantage for one part of the condition as heir, and the other as assignee. Mo. 113. pl. 254. Pasch. 20 Eliz.

[303]

4 Rep. 52.

Mich. 29

& 30 Eliz.

B. R. Raw-

lin's case

S. C.—

S. C. cited

by Hale Ch.

J. Vent. 257.

7. A. makes lease to B. rendring rent upon condition to pay a fine on a day certain. B. re-demises this land to A. before or after the day of payment of the fine, this is no suspension of the condition because it is collateral, but if the condition had been to pay the fine annually the re-demise would suspend the whole condition, because in such case it is entire. Jenk. 254. pl. 46.

8. Mortgagee demises the land to the mortgagor for years. This demise does not suspend the condition; for the payment of the mortgage money does not arise from the profits of the land, and it is a condition collateral. Jenk. 254. pl. 46.

9. A. leases to B. 2 acres for 20 years, rendring rent with condition of re-entry; lessee leased 1 acre for 10 years, and afterwards granted the reversion in the 20 years in the said one acre to lessor, it was held to be no present suspension of the said condition, because there was not any possession. 3 Le. 221. pl. 295, Pasch. 30 Eliz. in Cam. Scacc. Brightman's case.

10. Lease

10. Lease with condition to *re-enter for not repairing, &c.* lessor, with the consent of the lessee, builds a new barn on part of the land, and the lessee takes a *new lease of the new barn*. By the new lease the condition is suspended; for it cannot be apportioned, and the new lease is a surrender for that part. Noy. 126. Culcoe, v. Sharp.

11. If A. lets to B. for 10 years, and B. *re-demises* to A. for six years to commence *in futuro*, in the mean time this works no suspension either of rent or condition; per Cur. Vent. 91. Trin. 22 Car. 2. B. R. in the case of Lion v. Carew.

The condition is not suspended for the suspension of the condition arises

by a present interest passed by the lessee to the lessor, so that the lessee ought to have profit of it; adjudged and affirmed in error. Jenk. 254. pl. 46. — 4 Rep. 52. b. Mich. 29 & 30 Eliz. Rawlins's case. — S. C. cited Vent. 277. per Cur. who observed that the resolution in that case as to suspension of the rent was not necessary to the judgment given in that case which was upon the extinguishment of the condition, which is entire and not to be apportioned.

(G. d. 3) Revived in what Cases.

1. **I**N debt, the defendant was bound to the plaintiff in 100 l. *to make his eldest son marry the daughter of the plaintiff, and that if he dies before carnal copulation, that he shall make his second son marry the same daughter within a year, if the law of the church will permit it; and after the eldest son married her and died before carnal copulation, and the plaintiff obtained a licence, and required the defendant to make the second son marry with the daughter within the year, and he refused, and the plaintiff sued the obligation; and they demur, &c.* For it was agreed there, that at the time, &c. of the making of the obligation, it was not lawful that the younger brother should marry her who was the feme of his eldest brother; and therefore quære if the obligation, which was discharged before by the licence, in as much as the law of the church would not permit it, may revive by the licence obtained after, and to be forfeited now where it was discharged before; for the *second marriage was not permissible by law, but by the licence which came after*; for the giving of the licence proves that the law would not suffer it, for the licence is a dispensation with the law; and therefore it seems that the obligation is not forfeited. Br. Conditions, pl. 194. cites 12 H. 8. 5.

[304]

(H. d) In what Cases, *after Refusal*, he shall say
Uncore Priſt.

See Tit. Tout Temps priſt, per totum.

[1. **A** MAN bound in 20 quarters of corn, upon condition * [to * 9 Rep. pay] for 10 quarters; if it be refused at the day, he may plead it, without saying uncore priſt. Co. 9. Prytoe 79. for it is bonum perituum, † 28 H. 8. 25. 154.

and ſays, that ſo it was held in 28 H. 8. in C. B. as Carrel has reported. Ibid. 79. a. b. — Ca. Litt. 207. a. S. P. accordingly.

† D. 24. b. 25. a. pl. 154. Hill. 28 H. 8. cites Trin. 12 H. 8. Rot. 542. Brickhead v. Wilſon S. P. adjudged for the plaintiff; for that the defendant ſhould have pleaded that he was uncore priſt to deliver the 10 quarters.

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[2. A man

S. P. because it is no parcel of the sum contained

[2. A man bound in a statute, recognizance, or obligation, defeated for a lesser sum; the obligee refused at the day, it is gone for ever. Co. 9. *Peytoe* 71. b.]

in the obligation, &c. it being contained in the defeasance made at the time, or after the obligation statute or recognizance. Co. Litt. 207. a. — By the tender in such case he is discharged of all; but otherwise it is of an obligation with condition to pay a less sum. Cro. E. 755. pl. 26. Pasch. 42 Eliz. C. B. *Cotton v. Clifton*. — In the case of a defeasance the sum is collateral, and that is the reason that if the obligor tenders at the day, and obligee refuses it, that it is lost for ever. 9 Rep. 79. b. and citat 33 H. 6. a. a. b.

3. In debt upon obligation upon condition, that if the defendant, by and within the feast of St. Bartholomew, or before the feast, deliver 40 cloths to the plaintiff, the plaintiff paying to him 10 l. for every cloth immediately, that then, &c. and that in the vigil of the feast, the defendant came to the plaintiff's house, and there was ready to have delivered, &c. and the plaintiff, nor any for him, were not ready to pay him; per Choke, you ought to say that you was there all the day, and the plaintiff, nor any other was ready to receive it, and that he is yet ready, which all the justices agreed, by which he said accordingly. Br. Conditions, pl. 174. cites 21 E. 4. 52.

4. In debt upon obligation, the defendant pleaded that the plaintiff by deed indented betwixt them covenanted that the defendant paid him 50 l. at Mich. the obligation should be void, at which day he tendered the money, and the plaintiff refused it; the court held the plea good without saying uncore prist; for the indenture of defeasance is a collateral covenant, and not parcel of the obligation, as the condition indorced is; per Dyer, Mo. 36. 37. pl. 119. Trin. 4 Eliz.

This is to be understood that he that ought to tender the money is of this

5. In all cases of condition for payment of a certain sum in gross, touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit and fully discharged for ever after. Litt. Sect. 338.

discharged for ever to make any other tender; but if it were a duty before, though the feoffee enter by force of the condition, yet the debt or duty remained; as if A. borrows 100 l. of B. and after mortgages the land to B. upon condition for payment thereof; if A. tenders the money to B. and he refuse it, A. may enter into the land, and the land is freed for ever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if A. without any loan, debt or duty preceding, infeoff B. of land upon condition for the payment of 100 l. to B. in nature of a *grainage* or *gift*, in that case if he tenders the 100 l. to him according to the condition, and he refuse it, B. hath no remedy therefore; and so is our author in this and his other cases of like nature to be understood. Co. Litt. 209. a. b.

[305] (I. d) *What Things will destroy a Condition ;*
and what not.

Acts by the Reservor.

*D. 308. b. 309. a. Winter's case. Co. Litt.

[1. *D. 14 Eliz. 309. 75. agreed per Curiam that by the grant of the reversion of part of the lands upon a lease for years, on which a rent upon condition is reserved, all the condition is confounded, because it is penal, and therefore cannot be divided; and he

he must destroy his own grant if the condition shall remain, *although* ^{215. a. S. P.} *also this condition was reserved upon several rents.* Co. 5. † *Knight* ^{& S. C.} *55. b. resolved.* ^{cited in}

^{Marg. —}
^{S. C. cited}
Godb. 336. pl. 431. — S. C. cited And. 174. in pl. 211. — S. C. cited by Anderson and Rhodes. Mo. 205. — S. C. cited by Periam J. Gouldsb. 21. — S. C. cited 3 Le. 144. pl. 178.

† And. 173. pl. 211. *Knight v. Brech.* S. C. & S. P. admitted per Cur. — Mo. 199. pl. 349. S. C. & S. P. admitted per Cur. — Gouldsb. 15. pl. 14 & 19. pl. 1. S. C. & S. P. admitted. — 3 Le. 124. pl. 178. *Knight v. Beech.* S. C. & S. P. admitted per Cur. — 2 Roll. Rep. 332. Trin. 21 Jac. B. R. Anon. S. P.

[2. Co. 5. *Knight 55. b. resolved*, [if] the king grants part of ^{Mo. 203.} *the reversion*, his patentee shall not take advantage of the condition, ^{S. C. & S. P.} *but the king by his prerogative may*, because it remains in him.] ^{argued by} ^{Periam and} ^{Windham,}

that the condition was gone, but by Anderson and Rhodes e contra, and at length the cause was ended by agreement. — And. 174. pl. 211. S. C. & S. P. argued. — Gouldsb. 15. pl. 14. S. C. — 3 Le. 124. pl. 178. S. C. — Co. Litt. 215. a. S. P. that in the king's case the condition is not destroyed.

[3. If a man leases for life upon condition, the remainder over, the condition is destroyed, because otherwise he shall destroy the remainder which he hath created.] ^{See (P. d)} ^{pl. 2. & 9-} ^{and the} ^{notes there.}

[4. So if a man devises for life upon condition, the remainder to another; this destroys the condition. 29 Aff. 17. Co. 10. Ma. Port. 40. b. and there 41. b. he cites * 4 Ma. per Curiam. Contra 2 Ma. 127. 52. because it is made at the same time.] ^{See (P. d)} ^{pl. 8. and the} ^{notes there.} ^{* Dr. Butt's} ^{case.}

[5. If a man leases for years upon condition, and after leases for years by indenture to another, to commence presently, this second lease hath not given away the condition, for it is but by estoppel between the parties. Patch. 41 Eliz. B. R. per Curiam.]

6. If a man infeoffs me upon condition to pay him 10 l. such a day, or to re-enter, and I lease the land to him rendring rent, and at the day I do not pay the 10 l. now he shall retain the land, and the rent reserved by me is extinct; per Brian Ch. J. Br. Conditions, pl. 167. cites 20 E. 4. 18, 19.

7. But if a man makes feoffment in fee, rendring rent, with clause of re-entry for non-payment, and the feoffee re-infeoffs the feoffor, the feoffor cannot re-enter for non-payment of the rent, because he himself has the land out of which the rent is issuing; but that otherwise it is of a sum in gross as above; per Brian Ch. J. Br. Conditions, pl. 167, cites 20 E. 4. 18, 19.

8. And the law seems to be the same of a lease made after by the feoffee to the feoffor for years or life, for hereby the rent is suspended, Ibid. per Brooke.

9. In debt, the master and brothers of St. Bartholomew of London had granted to J. S. for his life such corody, &c. *faciendo talia servitia as N. and others did*, and the grantee leased to the master and brothers for 7 years, rendring 10 l. rent; the grantee brought debt, and the grantor said that the plaintiff has not done the services; and the plaintiff said that he is excused by reason of the lease to the grantor, which is a suspense, by which it was awarded that the plaintiff shall lose his rent and the corody. Br. Conditions, pl. 167. cites 22 E. 4. 17. [306]

10. If a man mortgages his land upon defeasance of re-payment to re-enter, and the bargain to be void, and the vendee leases his land to the vendor for 10 years by indenture of defeasance, and further grants to him that if he pays 1000 l. within the said term of 10 years, that then the sale shall be void, &c. and the lessee surrenders the term, yet the tender of the 1000 l. within the 10 years is good, because the 10 years is certain so the lease is surrender'd or forfeited; and e contra if it was to repay within the term aforesaid, without these words (10 years.) For in the one case the term, viz. the lease is a limitation of the payment, and in the other case the 10 years. Note a diversity. Br. Conditions, pl. 203. cites 35 H. 8.

11. Lease for life reserving rent, and for default a re-entry, the re-remainder over in tail; this remainder does not destroy the condition, because it was made all at one time. But when condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the condition is gone. D. 127. pl. 53. Hill. 2 & 3. P. & M. in case of Warren v. Lee.

12. A. leases a house and lands to B. and takes back a lease of part, and after part of the rent is behind, and A. enters into B's part for the condition broken. Adjudg'd that the condition is gone and void by A's taking a lease back of part, because a condition is special and entire, and not to be severed. Owen 41. Hill. 26 Eliz. Britman v. Stamford.

A condition must be extinct where part of the thing demised comes to the lessor, because it is annexed to such a rent in quantity; for if the rent be diminished the condition must fail, per Hale Ch. J. Vent. 278. Mich. 27 Car. 2. B. R. in case of Hodgskins v. Robson and Thornborough.

The case was, viz. A copyholder made a lease for 16 years, rendering 20 l. rent. Lessee made a lease of part of the land for 30 years without any rent. The last lessee assigned his term to the first lessor. All the court agreed that the first lessor shall have all the rent against the lessee, and he nothing against his under-lessee, because he reserved nothing, nor shall the under-lessee have any thing against the first lessor for the same reason. 2 Lev. 143, 144. Trin. 27 Car. 2 B. R. Hodgson v. Thornborough.

13. A. gave land upon condition to B. and afterwards A. by fine releases to B. all his right, yet the condition remains. 2 And. 84. Mich. 39 & 40 Eliz. cites the case of Denham v. Dormer.

Ow. 116. S.C. adjudged. 14. A lease was made for years upon condition to be performed by the lessor, and before the time of performance the lessor leases it to a stranger for years, and then performs the condition. It was objected that by making this 2d lease the condition was dispensed with; but all the court e contra; for the estoppel is only between the lessor and the 2d lessee, and adjudg'd that the lessor's entry was lawful. And Coke Att. Gen. being in court said it was a clear case. Cro. E. 665. pl. 16. Pasch. 41 Eliz. Ferrers v. Burrough.

15. But if one makes a feoffment on condition, and afterwards levies a fine to a stranger, the condition is gone. Cro. E. 665. pl. 16. Pasch. 41 Eliz. in case of Ferrers v. Burrough.

Mod. 336. pl. 437. Hawke-worth v. Davis. S.C. and agreed by the justices that 16. Lease for years rendering rent with clause of re-entry, lessee assigned all his term in one part to one, and in another part to another, and kept a part to himself; lessor levied a fine of the reversion of the whole to J. S. The rent is arrear. The first lessee paid all the rent, The rent is arrear again. The assignee of the lessor demands the rent and enters. Per tot. Cur. his entry is lawful; for the lessee by

by the apportionment of the land cannot destroy the condition, though true it is * if the lessor grants the reversion of part, all the condition is destroyed, and the acceptance of the rent is not material. 2 Roll. Rep. 332. Trin. 21 Jac. B. R. Anon.

the condition was not destroyed by this, it being the act of the lessee

himself and so no colour to destroy the condition. — Palm. 382. S. P. on a lease made by Fitz Williams, and seems to be S. C. and for non-payment the grantee entered into the whole and held lawful; for the law by apportionment of the land cannot destroy the condition, as lessor may by grant of part of the reversion, and Chamberlain J. said it had been so adjudged before in this court.

(K. d) [*Destroyed or suspended by*
Acts in Law.]

Fol. 473.

[1. **D.** 14 Eliz. 309. 75. per Curiam, if the reversion of a lease for years be severed in any part, the entire condition reserved upon the lease for years shall not be destroyed, if the severance be by descent, eviction, or act of the law; otherwise by the act of the party.]

D. 308. b. 309. a. Winter's case.

[2. If a man makes a feoffment to the use of himself for life, the remainder to another, &c. with power of revocation, and after makes a lease for years; he cannot after revoke during the lease. Pasch. 3 Jac. between Yeoland and Fettis, per Curiam, agreed.]

Mo. 788. pl. 1087. Mich. 2 Jac. Yelland v. Fictis, S. C. Coke Ch. J. held that he may revoke for all ex-

[3. But after the lease expired he may revoke. Dubitatur, P. 3 Jac. B. between Yeoland and Fettis.]

cept the term; and that if one makes a conveyance with power to make lease, and with power of revocation, if he makes a lease he may revoke for the residue; but he said the doubt here is, where he has no power to make leases and yet he makes one; the court were divided in opinion. — Mod. 114. pl. 13. Hale Ch. J. cited 16 Car. Snape v. Sturt, that if there be a power of revocation and a lease for years is made, it suspends quoad the term, but after it is good. — See Tit. Powers, (A, 16) (D) & (E)

4. Lease for years, proviso, that the lessee, his executors or assigns, shall not alien nor grant over the term without licence of the lessor, but only to one of the children of the lessee; the lessee died, and his executor granted the term to one of his sons. Brooke, Browne, and Dyer held that by the grant to one of the sons the restraint was not determined, and that the son could not grant over to a stranger without licence; but Stamford and Catline e contra. The reporter adds, Sed quære hoc, and also quære if this be a condition or only a covenant; for it was not agreed as to that point among the justices. D. 152. a. pl. 7. Mich. 4 & 5. P. & M. Anon.

5. Lessee for 100 years leases for 20 years with clause for re-entry. The first lessor grants the reversion in fee, and attornment was had accordingly; grantee purchases the reversion of the term, he shall neither have the rent nor re-entry; for the reversion of the term, to which it was incident, is extinct in the reversion in fee. Mo. 94. pl. 232. Pasch. 12 Eliz. Ld. Treasurer v. Barton.

6. Condition was that all assurances shall be to the uses of the indenture; this condition is not extinguished by a fine; but without such agreement

Jenk. 252. pl. 43. S. C. the 3d co.

agreement condition should be extinct by fine, or *feoffment*, or by
 cordingly. general entry into a *warranty*, or by being *received* generally.
 —2 Rep. Mo. 106, pl. 105. Mich. 17 & 18 Eliz. Andrew's case.
 72. b. S. C.

[308] 7. *A. infeoffed B. on condition to convey it to A. for life, remain-
 der to A's eldest son in fee; A. takes the profits, and leases the land
 to C. for years by indenture, and yet continues the possession; re-
 solved, that A's taking the profits, and making a lease for years,
 was a disseisin to B. and suspended the condition during the term.
 2 Rep. 59. b. Mich. 40 & 41 Eliz. B. R. the 2d. resolution in
 Winnington's case.*

8. *A. termor for years granted his term to J. S. upon condition, that
 if the grantee did not yearly pay to R. 10 l. that the grant should be
 void, and after the grantor made the grantee executor and died.
 Per Popham and Gawdy, the condition is extinguished, but Cleach
 and Fenner, e contra. Goldsb. 181. pl. 117. Hill; 43 Eliz.
 Tutball v. Smote.*

9. *A condition is annexed to 2 acres, 1 acre is evicted by an
 eigne title, the condition is gone. Per Haughton, J. 3 Bulst. 60.
 Trin. 13 Jac.*

Per Dode-
 ridge J.
 Roll. Rep.
 299.

(L. d) Into what Thing the Entry may be for the
 Condition broke.

[1. IF a man leases two mills upon condition that if the lessee leases
 them, or assigns either of them to another, it shall be lawful to
 him to re-enter; if he leases one, the lessor may enter into both, for
 the condition goes to both. 38 E. 3. 34.]

12. 292. pl. 2. Lands were given in tail upon condition if the donee, or his
 400. Anon. heirs, discontinues the land, the donor shall re-enter; the donee hath
 2. C. states issue 2 daughters and dies, the daughters have issue 2 sons, and die;
 it that one of the sons discontinues the land to another; and it was held by
 of the daughters the court to be a breach of the condition. Cro. E. 35. pl. 2. Mich.
 levied a fine 26 and 27 Eliz. Br. R. Croker v. Trevithin.
 sur conusary
 de droit
 some con, &c. Cleach J. said that the words are (or any of his heirs) and therefore it is a forfeiture,
 quod fuit concessum per tot. Cur. And judgment accordingly.

3. *A lease was made to 2 for years upon condition that they, nor
 either of them, shall alien any part of the land, without assent of the
 lessor; they make partition, and one alieneth his part, this is a tor-
 seizure of the whole. Cro. E. 163. pl. 2. Mich. 31 and 32 Eliz.
 C. B. Gostwick's case.*

(M. d) At.

(M. d) At what Time he may enter for the Condition broke or performed.

[1. I. A. make a feoffment of the land to J. S. in fee upon condition that if he pays 10l. to J. S. the first of May, 6 Car. that it shall be lawful for him to re-enter, and after he pays the 10 l. before the day, scilicet, the first of April, and J. S. accepts it; though this is a good performance of the condition, inasmuch as payment before the day is payment at the day, yet A. cannot re-enter and recover his old estate by force of the condition till the first of May, because the condition does not give him power to re-enter till the said day. Mich. 8 Car. B. R. between Burgoyne and Spurling, held by Barkly, in the case of a surrender of a copyhold.]

C. 10. C. 273, pl. 10 & 283. pl. 27. S. C. but S. P. does not appear. — Jo. 306. pl. 17. S. C. but S. P. does not appear. [309]

2. In assise the jury said, that A. leased to B. upon condition, that if A. or his heirs pay to B. or his heirs 10l. within a certain time, that he shall re-enter, and if he does not pay within the time, and B. pays him 10 l. within another term after, that then B. shall have fee, and A. nor B. does not pay, and A. re-enters: and after that both days were passed B. ousted him, and A. brought assise, and took nothing by his writ, because it seems that B. has franktenement for his life by the first livery; for A. cannot re-enter, because he did not pay, and B. cannot have fee because he did not pay. Br. Conditions, pl. 102. cites 12 Ass. 5.

3. In assise a feme was seized, and infeoffed a man, who had a feme, upon condition that he should marry her. The feoffee infeoffed A. who infeoffed B. who infeoffed C. who infeoffed D. The first feoffee died; the feme entered upon D. 16 years after, and the entry good, for it is admitted a good condition; for though the feoffee cannot marry at the time of the feoffment, yet it may be that his feme shall die, and then he might have married the feofforefs, and therefore a good condition, and the entry lawful. Br. Conditions, pl. 119. cites 40 Ass. 13.

Br. Conditions, pl. 202. cites S. C. and F. N. B. 205.

4. Note, by three justices, that if a man covenants with C. that certain recoverors shall suffer him to take the profits of such land till J. satisfy him of 100 l. There C. shall take the profits till J. pay him 100 l. and the profits shall not be taken as parcel of the 100 l. Contra Shelley, but he did not persist strongly in his opinion. Br. Exposition, pl. 1. cites 27. H. 8. 5.

5. The condition of a feoffment was to pay 20 l. at Michaelmas, and so every year, and after such default the feoffment to be void. Ruled by the judge, that it is uncertain in this case when re-entry shall be made, Clayt. 86. pl. 145. Summer Assizes, 16 Car. before Foster J. Fall's case.

Sec Tit. Co- (N. d) *Who may enter for the Condition broke.*
 venant, the

notes on
 Stat. 32 H. 8. cap. 34. [1.] F a feoffment be made upon condition to infeoff a stranger, and the feoffee does not perform it, the stranger cannot enter for the breach of it, because he is a stranger to the condition. 21 E. 4. 56.]
 But it seems elsewhere, that if a man infeoffs another

infeoffs another to infeoff the first feoffor, and the feoffee offers to him, and he refuses, there the feoffor cannot re-enter; for there is default in him. Contra in the other case; there is not any default in the feoffor when the stranger refused; per Newton and Paston J. and Fulthorpe J. accordingly, and so 3 justices in one opinion, and none to the contrary but Fortescue serjeant; quod nota. Br. Conditions, pl. 53. cites 19 H. 6. 34.

So if a man infeoffs J. S. upon condition that if J. S. do not pay 10 l. yearly to a stranger, that then the stranger may re-enter, and it is by deed indented, and after J. S. does not pay the stranger, there the feoffor may enter, but not the stranger; quod nota. Br. Conditions, pl. 305. cites Doct. & Stud. lib. 2. fol. 94.

S. P. for it [2. But in this case the feoffor himself may enter for the condition broke. 21 E. 4. 56.]
 appears that it was not the intent of

the feoffor that the feoffee should retain the land. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76.

[310] [3. He in remainder cannot enter for a condition broke by the particular estate. 29 Aff. 17.]

The alienation was by licence of the king, and the condition was [4. If the king's tenant aliens upon condition, and dies, his heir in ward to the king for other land, the king may enter in the right of the heir for the condition broke, 18 Aff. 18. adjudged, lord Clifford's case.]

to re-infeoff the tenant. Br. Conditions, pl. 105, cites S. C. Co. Litt. 222. a. b. cites S. C. 2 Rep. 80. a. b. cites S. C. and the reporter adds his observations upon it. Tenant of the king infeoffed A. to re-infeoff him or his heirs, and died before re-infeoffment, his heir being within age, and this was found by office, whereupon the king seized for the condition. Br. Conditions, pl. 229. cites 42 Aff. 6.

Br. Conditions, pl. 104. cites S. C. and Brooke says, [5. If the king's tenant aliens in fee upon condition, and dies, his heir within age, the king may enter in the right of the heir for the condition broke. 17 Aff. 20.]

quod nota, that this was by entry descended, and yet the feoffment was by licence of the king; quare ludo legem.

Mo. 525. pl. 694. Davy [6. If a man leases for years, upon condition if the rent be arrears that the lease shall cease, and then grants over the reversion, and after the condition is broke, the grantee of the reversion may enter into the land, for the lease * is determined before entry by the breach of the condition. H. 41. El. B. R. between Darcy and Mathewe.]
 * Fol. 474.
 v. Mathews and Binfield, Mathewe.]

S. C. but states it, that A. seized for life of his wife made a lease of a mill to B. the defendant in ejectment for 17 years, who afterwards assigned the same to C. for 14 years, rendering yearly 3 bushels of melyn, and one bushel of wheat every Saturday, and if any part thereof should not be paid the lease should cease. B. entered and was possessed, and C. being possessed by the reversion of deed-poll, granted all his reversion & totum statum & interesse to D. to whom B. attorn'd. D. demanded the rent, and for non-payment enter'd. Clench, Gawdy, and Fenner (absente Popham) agreed, that by the common law the assignee de toto statu shall take advantage of the cesser of the term in esse, and make demand of the rent, if the grant de toto statuto by writing and attornment had, and vouch'd 11 H. 7. and Smith v. Stapleton, in

In *Blowden*. And they all, (absente Popham) agreed, that by the Stat. 32 H. 8. the grantee of the reversion of the term shall have benefit of the condition annexed to the lesser term derived out of the first term, and this by reason of the words in the statute, viz. that the grantees, their executors, &c. and therefore it was adjudged for the plaintiff. — Cro. E. 649. pl. 40. *Davy v. Matthew*, S. C. and *Clench and Fenner* held, that in this case the grantee shall take advantage by the common law; for the estate shall cease without entry, because * beginning by parol it may so determine; but if he cannot by the common law, he may clearly by the statute, for by that lease made the lessor has the reversion, and the grantee has that reversion and rent, and is within the intent of the statute 32 H. 8. for he has the entire reversion, and Gawdy was of the same opinion as to his being within the statute; but he doubted whether he might by the common law; wherefore Popham absente, it was adjudg'd for the plaintiff. — But in this case, if the lease had been for life upon such condition, the grantee shall not take advantage of the breach of the condition, for this is but avoidable by entry after the condition broken, which cannot be by the common law transferr'd to a stranger, 3 Rep. 95. b. *Trin. 7 Jac.* per Cur. in *Manning's case*, — 10 Rep. 48. b. S. P.

* [Quære what this means.]

7. *Assise; feme tenant in tail after possibility of issue extinct, the reversion to R. in fee, takes baron; the baron and feme alien to him in reversion, rendering rent for life of the baron by deed indented, with clause of re-entry for non-payment within 8 days. The alienee aliens over. The rent [was] arrear. The baron and feme entered for the rent arrear, and the entry adjudged lawful because of the rent arrear, and not because of the alienation of the alienee; and it cannot be adjudged a surrender, because it was made by the baron for his life, and the feme may survive him, and it cannot be adjudged alienation to the disinherittance, &c. for it was made by assent of him in reversion, and it is not a discontinuance, because it is made to him in reversion.* Br. Conditions, pl. 112. cites 29 Ass. 64.

8. *Baron seised in jure uxoris infeoffed J. S. upon condition to lease to him and his feme for term of life, the remainder over in tail, the remainder in fee to the right heirs of the baron. The baron dies, J. S. leased to the feme for life, remainder in tail, remainder to the right heirs of the feme. The heir enter'd for the condition broken, and the feme enter'd upon him, and per tot. Cur. præter Cheynie her entry is congeable,* Br. Conditions, pl. 71. cites 4 H. 6. 2. 3. [311]
Br. Entre Congeable, pl. 38. cites S. C. for by the re-entry the discontinuance is purged, and thereby gives re-entry to the feme. — Br. Discontinuance, pl. 8. cites S. C. — S. C. cited 8 Rep. 44. a. — Co. Litt. 202. a. S. P. and when the heir has entered for the condition broken his estate vanishes, and the estate is presently vested in the wife. — Ibid. 236. b. S. P.

9. If A. infeoffs B. upon condition to re-infeoff him in fee, and A. dies, yet B. ought to infeoff the heir of A. and if B. had tendered seoffment to A. and he refused, and died, yet the heir of A. shall make request, and shall have the land; quære inde, where no time is limited. Br. Conditions, pl. 55. cites 19 H. 6. 67. 73. 76.

10. If a man leases land for term of years upon condition that if he does not go to Rome by such a day his estate shall be void, and the lessor grants the reversion over, the tenant attorns, and after he does not go, the grantee may enter. Br. Conditions, pl. 245. cites 11 H. 7. 17. There is a diversity between a condition annexed to a freehold, or to a lease for years; for if a man make a gift in tail, or a lease for

11. *Contra* if the condition was to re-enter. Ibid.
12. *But of a thing void* purchaser may take advantage, and the same of lessee for term of life. But Brooke says quære inde; for per Bromley Ch. J. 2 M. it is not void till an entry. Ibid.

life upon condition, that if the donee, &c. goes not to Rome before such a day, the gift, &c. shall cease or be void. The grantee of the reversion shall never take advantage of the condition, because the estate cannot cease before an entry. Co. Litt. 214. b.

But if the lease had been but for years the grantee should have taken advantage of the like condition, because the lease for years, ipso facto, by the breach of the condition without any entry was void; for a lease for years may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony, and of a void thing an stranger may take benefit, but not of a voidable estate by entry. Co. Litt. 214. b. — S. C. cited Le. 61. in pl. 79. Finch. 29 Elis. C. B. in case of Gamock v. Cliff, & S. P. per Curiam held accordingly.

13. A man gave in tail upon condition that if the donee die without issue, or be, or his issue, alien in fee, that his estate shall cease and the land shall remain to a stranger; the donee aliened in fee, and had issue and died, and it was held a good condition as to the donor, if he had reserved the entry to himself, but it is not good to make the stranger have the remainder; for rent, re-entry, conditions nor remainder cannot be reserved nor appointed to a stranger quod nota, and so, per Frowick, the condition in the principal case cannot make the land to remain to a stranger, quod Vavasor conceffit, and this by three justices. Br. Conditions, pl. 83. cites 21 H. 7, 11.

14. The prior of Saint John's in Jerusalem in England leased for years the commandry of Babil by indenture to Martin Docknye, proviso, that if the said prior, or any of his brothers there being commanders, would inhabit in it, that then the said M. D. and his assigns oblige themselves by the same indenture, upon a year's warning, to remove or give place to the said prior commandry; and after the prior died, and one who was brother at the time of the demise was made prior, and was also commandry, by which he gave warning by a year, and M. D. would not avoid, and the prior entered, and it was in question whether the prior may be commandry also or not, and if a man may give place to a dead person as the brothers were? But this was not much weighed, &c. But the questions were, whether the words above were a condition, and if it be a condition whether they extend to the successor, because no successor was mentioned in the indenture; and by the best opinion it does not extend to the successor if it be a condition, because the indenture spoke only of the prior and not of the successors. And, per Audley chancellor, this word (*habitation*) in the condition goes to the person of the prior only who is now dead. Br. Conditions, pl. 7. cites H. 8. 14, 15.

15. No manner of persons shall take advantage of conditions executory if they be not parties or privies; for privies in estate shall not take advantage of conditions executory, &c. Perk. S. 830.

16. If a man seised of land leases it for life upon condition that the lessee shall pay 20 s. at a day certain the remainder unto J. S. in fee. J. S. shall not take advantage of this condition by way of entry, and yet he is privy in estate; for both their estates were made at one and the same time, &c. Perk. S. 831.

17. Nor privies in fact shall not take advantage of conditions executory; and therefore, if a man seised of land leases it for life upon condition, &c. and afterwards grants the reversion unto a stranger in fee, and the lessee attorns, yet the grantee shall not take advantage of this condition by way of entry, notwithstanding he be privy in fact, because he has the reversion by grant, &c. Perk. S. 831.

18. Nor

Condition.

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18. *Nor privies in law shall not take advantage of condition executory; and therefore, if there be lord or tenant, and the tenant doth lease the tenancy for life unto a stranger upon condition, and afterwards the tenant dies without heir, and the reversion escheats to the lord, the lord shall not take advantage of the condition by way of entry; and the lord in this case is said privy in law, because he has his estate in the reversion by the law only, viz. by escheat.* Perk. S. 831, 832.

S. P. that the lord by escheat shall not enter for breach of condition, because he is not heir to the lessor; but if any rent be come in arrear he may distrain. Litt. S. 348.

19. *But privies in right shall take advantage of conditions executory, &c. and therefore, if lessee for years be of land, and he granteth his estate unto a stranger upon condition, &c. and maketh his executors and dies; in this case his executors shall take advantage of this condition, by way of entry, for they are privies in right; for if the condition be broken, and they do enter into the land, &c. they shall have the same in right of the testator, &c.* Perk. S. 832, 833.

Co. Litt. 14. b. S. P. accordingly, and so of an administrator where the lessee dies intestate; for they are privy in right, and represent the person of the deceased.

20. *If a man seised of land for the term of 20 years in right of his wife, leases it to a stranger for ten years rendering rent, &c. and for default of payment to re-enter; the husband dies and then the rent is behind. I conceive that the wife shall have the rent, and not the executor, because the rent was to the husband by way of reservation, and the wife has the remainder of the term; but though the wife shall have the rent, yet she shall not enter for the condition broken; causa patet, &c.* Perk. S. 834.

Baron distinguishes the right of the feme, upon condition, that after his death his heir shall enter into the land by reason of the condition broken, now the feme shall enter; per Fineux J. Kelw. 64. b.

21. *If an abbot infeoff a stranger of land, which he has in right of his house, upon condition, his successor shall take advantage of the condition by way of entry if it be broken, because that he is privy in right; the same law is of dean and chapter, and such like persons, mutatis mutandis.* Perk. S. 835.

So if a bishop, archdeacon, prebendary, parson, or any other body politic or corporate, ecclesiastical or temporal, make a lease, &c. upon condition his successor may enter for the condition broken; for they are privy in right. Co. Litt. 214. b. — Mo. 152, pl. 152. Pasche 5 Eliz. Eire's case, S. P. as to an entry for a condition in deed broken; but otherwise of a condition in law as waste, forfeiture, &c. — And. 9. pl. 19. Anon. S. C. but S. P. does not appear. — D. 221. b. pl. 20. Ayer v. Orme, S. C. and was upon a lease made by the archbishop of York, and confirmed by the dean and chapter, in which the rent was reserved to the archbishop and his successor, provided that in time of vacancy of the archbishoprick the rent shall be paid pro rata of the vacancy * to the chapter of the cathedral church, ut in jure suo, &c. The fee voided and continued void more than six months, and for rent arrear during the vacancy, the new archbishop entered; but because the condition arises upon a rent to be paid neither to the lessor nor to his successor, and the breach of the condition being neither in the one's time nor in the other's, it was held by Weston and Brown that the successor could not enter.

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22. *And privies in blood as the heir of the feoffor, &c. shall take advantage of conditions executory by way of entry, &c.* Perk. S. 835.

As in trespass of breaking his close the defendant pleaded, that his father, whose heir he is, infeoffed the plaintiff upon condition to re-infeoff him when required, and did not name his heir in the condition; but the heir shewed that he required the plaintiff to re-infeoff him after the death of his father, and because he would not, he entered;

entered; and the plea held good notwithstanding the heir was not named in the condition. *Kelw. 117. pl. 125. Casus incerti temporis* cites *Mich. 7 H. 6.*—*Co. Litt. 219. a.* the heir may enter.—*2 Rep. 80. a. S. P.* cites *Lit. Cap. Conditions, fol. 82. [S. 353.]*

23. *Devise of lands to A. on condition to pay a certain debt, and if A. fails payment, then to B. and his heirs for ever on condition that he shall pay the debt, &c.* Devisor dies. A. the executor doth not pay the debt. B. dies. The money is demanded of his executor [who does not pay it.] *Quære, if the heir of B. may enter to perform the condition or not.* D. 128. pl. 59. *Hill. 2 and 3 P. & M. Wilford v. Wilford.*

24. *Bailiff* cannot by his office enter for condition broken without special warrant. *Mo. 52. pl. 152. Pasch. 5 Eliz. per Cur. agreed. Eires's case.*

IF I infeoff one on condition to infeoff J. S. who refuses, now the feoffee shall be seised to my use; but if it were to give in tail it would be

contrary; held per Cur. And *Harper J.* said, that if a feoffment in fee be made to J. S. on condition that he shall grant a rent-charge to A. who refuses it, J. S. shall be seised to his own use. *Le. 266. pl. 254. 20 Eliz. C. B.*—*S. P. Arg. Le. 199. cites 2 E. 4. 2 & 19. H. 6. 34.*—*Co. Litt. 209. a. S. P.* as to making a gift in tail or granting a rent-charge; but contra as to condition to infeoff a stranger who refuses; for there he says the feoffor may re-enter, because by the express intent of the condition the feoffee should not have and retain any benefit or estate in the land, but is as it were an instrument to convey over the land.—See (L. c) pl. 4-5. and the notes there.

27. If a feoffment of lands in borough English be made upon condition, the heir at common law shall take advantage of it; agreed. But whether the younger should enter upon him *Manwood* put as another question. *Godb. 3. pl. 3. Pasch. 20 Eliz. C. B. Anon.*

Le. 298. pl. 409. S. C. adjudg'd for the heir (the plaintiff.)—*Savil. 76. pl. 155. S. C. adjudg'd that the entry was lawful.*

28. R. cesty que use after the Stat. 1 R. 3. and before the statute 27 H. 8. devised the use to his younger son upon condition. The condition was broke. J. the eldest son of R. entered. Adjudg'd, after some doubting, for J. the heir; because the 27 H. 8. gives the possession in quality and condition with the use, and likewise to cesty que use such benefit and advantage as the feoffees had, so that J. was enabled to take benefit of the breach, whether it was a condition or a limitation. *Mo. 212. pl. 353. Mich. 27 & 28 Eliz. Rudhall v. Milward.*

29. Where the words of a condition are *quando dimissio prædicta erit vacua*, and no clause of re-entry is reserved, so that privacy is not requisite, tenant in dower shall take advantage. *Le. 61. pl. 79. Pasch. 29 Eliz. C. B. Gamock v. Clif.*

No one can take advantage of a conditional

fee simple but the donor, &c. and not a third person. & *And. 22, 23.*

30. No one can defeat an estate of freehold by condition, unless the heir. *And. 184. pl. 220. Trin. 29 Eliz. in case of Paine v. Samms.*

31. An abbot leased lands to 3 men for 80 years, and in the end of the said lease was a clause, that if they died within the said term, then the lessor might enter. The possessions of the abbey came unto the king, who granted the reversion to J. S. who made a new lease thereof to J. D. for 21 years to begin after the expiration, determination or surrender of the former lease. The 3 lessees died within the term. All the justices held that J. D. could not enter before J. S. had entered; for it is in the election of J. S. if he will take advantage of the condition, and defeat the lease, but that ought to be by entry; and none can make such entry but the lessor himself, or by his express direction, &c. 3 Le. 269. pl. 363. Pasch. 33 Eliz. C. B. Anon. 4 Le. 101. pl. 207. S. C. in totidem verbis.

32. A. having 5 sons devises land to B. the eldest and his heirs, and 20l. to every of his younger sons to be paid by B. at their ages of 21 years. And if B. does not pay, then he devises the land to the younger sons and their heirs. Adjudged that if the 20l. be at the time unpaid to any one of the younger sons, though all the others are paid, yet the estate by the condition precedent shall go to all 4, and not to that one only. Mo. 644. pl. 891. Hill. 41 Eliz. B. R. Hainfworth v. Pretty. Cro. E. 919. pl. 14. S. C. adjudg'd. — Noy. 51. Aynsworth v. Batty, S. C. resolved.

33. If a man makes a lease for years upon condition that the lessee shall not go to Rome, or upon any other collateral condition, with a conclusion that the lease shall be void, if the lessor here grants over the reversion, and after the condition is broken, the grantee shall take benefit of it; but if a lease for life be made with such condition, there the grantee shall never take advantage of it, for the estate for life doth not determine but by re-entry; and entry or re-entry in no case by the common law can be given to a stranger. 3 Rep. 65. a. Trin. 38 Eliz. B. R. in Pennant's case.

34. A condition or limitation annexed to an estate of land ought to destroy the whole estate to which it is annexed, and not part of it, and cannot determine it in part and continue it for the residue; per Cur. 1 Rep. 85. b. Pasch. 42 Eliz. C. B. in Corbett's case.

35. There is a diversity between a condition that requires a re-entry and a limitation that ipso facto determines the estate without any entry. Of the first no stranger shall take advantage, but in case of a limitation 'tis otherwise. Co. Litt. 214. b.

36. As if a man makes a lease quousque (that is to say) until J. S. come from Rome; the lessor grants the reversion over to a stranger. J. S. comes from Rome; the grantee shall take advantage of it and enter, because the estate by the express limitation was determined. Co. Litt. 214. b.

37. So it is if a man make a lease to a woman quamdiu casta vixerit, or if a man make a lease for life to a widow, si tandem in pura viduitate viveret. So 'tis if a man makes a lease for 100 years if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter. Co. Litt. 214. b.

38. Diversity between a reservation of rent and a re-entry; for a rent cannot be reserved to the heir of the feoffor, but the heir may take advantage of a condition which the feoffor could never do. Co. Litt. 214. b.

39. *As if I infeoff another, upon condition that if my heir pay to the feoffee, &c. 20 s. that he and his heir shall re-enter*; this condition is good, and if after my decease my heir pays the 20 s. he shall re-enter, for he is *privy in blood*, and enjoys the land as heir to me. Co. Litt. 214. b.

40. If *lessee for years demises or grants the same upon condition, &c. and dies*, his *executors or administrators* may enter for the condition broken; for they are *privy in right*, and represent the person of the dead. Co. Litt. 214. b.

[315] 41. In case of a *lease for years* there is a *diversity* where the condition is that the lease *shall cease* or be void, or that the lessor *shall re-enter*. In this last case the grantee shall never take benefit of the condition. Co. Litt. 215. a.

42. If *cestuy que use* had made a *lease for years, &c.* the *feoffers* should not enter for the condition broken, for they are *privy in estate*, but not *privy in blood*. Co. Litt. 215. a. in principio.

43. By *act in law* a condition may be apportion'd in the case of a common person; as if a *lease for years* be made of *two acres, one of the nature of borough English, the other at the common law*, and the lessor, having issue two sons, dies, each of them shall enter for the condition broken; and likewise a condition shall be apportion'd by the act, and wrong of the lessee. Co. Litt. 215. a.

44. *Guardian in chivalry, or in socage*, in the right of the heir, shall by the common law take benefit of a condition by entry or re-entry. Co. Litt. 215. b.

45. *No entry nor re-entry may be reserved or given to any person, but only to the feoffor, or donor, or lessor, or to their heirs*, and cannot be given to a stranger; for if a man leases land for life by indenture, rendering rent to the lessor and his heirs, with a clause of re-entry, &c. if afterward the lessor by deed grants the reversion to another in fee, and the tenant for life attorn, &c. if the rent be after behind, the grantee of the reversion may distrain for the rent, because it is incident to the reversion, but he may not enter into the land and oust the tenant as the lessor might have done, or his heirs, if the reversion had continued in them, &c. Litt. S. 347.

46. If *feoffee on condition to re-infeoff refuses to re-infeoff, &c. on reasonable request* made by such as ought to have the estate, the feoffor or his heirs may enter. Litt. S. 353.

47. In every *exchange* a condition is implied; as if B. exchange with A. and A. with B. and B. aliens to C. and A. is evicted, he may enter upon C. but if C. be evicted by a title paramount, he shall not enter upon A. For the condition runs in *privity*, and does not extend to the assignee. 4 Rep. 121. a. b. Pasch. 1 Jac. per Cur. in Bultard's case.

48. If a lease be made upon condition *to be void if 10 l. be not paid at a certain day*, the grantee of the reversion shall not enter for such condition, because it is *collateral*; resolv'd. Mo. 876. pl. 1228. Chaworth v. Phillips.

(O. d) *What Things shall be avoided by Entry for the Condition broke.*

[1. *If the baron be infeoffed in fee, upon condition for the non-payment of a certain rent to re-enter, and after the baron dies, and after the condition is broke, and the feoffor enters upon the heir for the breach thereof, the wife of the baron shall not be endow'd; for her title is defeated by the entry for the condition broke.* 22 E. 3. 19. b. Curia.] Fitzh. Conditions, pl. 12. cites S. C.

2. In ejectione finis it was said by Finch. that if a man makes a feoffment upon condition that the feoffee lease to A. for life, the remainder to W. and he leases to A. reserving the reversion to himself, and the feoffor enters; by this he defeats the estate for life which is well made, because he ought to take franktenement by his re-entry; but *contra* if the condition had been to make a lease for years to A. the remainder to W. and he leased for years to A. reserving the reversion to himself; in this case the feoffor shall re-enter, and the lease for years is good; quod quare inde; for he that enters for condition in fait broken defeats the mesne estates, and is in as clearly as he was in at the time of making of the said feoffment. Br. Conditions, pl. 27. cites 44 E. 3. 22. [316]

3. And it was said, that if the feoffee in such case leases for life or for years, and after had granted the reversion to W. according to the condition, it is a good performance of the condition. Ibid.

4. The father surrenders a copyhold to the use of B. his son in fee, upon condition to perform covenants in such an indenture. B. after admittance surrenders to J. S. upon condition, that if B. pay 10 l. the surrender to be void. B. neither pays the 10 l. nor performs the covenants. The father enters and dies seised, and the lands descend to the son, who enters, upon whom J. S. entered. It was the opinion of the court, that by the entry of the father both the surrenders were avoided, and that the son might then well enter, and so he may confess and avoid the surrender made to J. S. and judgment for the defendant. Cro. E. 239. pl. 6. Trin. 33 Eliz. B. R. Simonds v. Lawnd.

5. A. infeoff'd B. on condition to convey to A. and his wife in special tail, remainder to the heirs of A. If A. dies before the conveyance, and B. conveys to the wife an estate for life only, omitting the privilege of without impeachment of waste, (which should have been inserted in respect of the estate to be made to her) yet this omission shall not give the heir of A. (for whose benefit this omission was) a re-entry which would *defeat the estate of the wife. Hawk. Co. Litt. 304. Litt. 3. 552. * 2 Rep. 82. a. Hill. 43 Eliz. C. B. in 18. Cromwell's case S. P.

6. Lease for years was made, rendering rent, upon condition of re-entry for non-payment. Afterwards the lessee acknowledged a statute. The rent was arrear, and the term was extended, but before the liberate the lessor enter'd and took the corn. It was argued that this entry was lawful, for that an extent is only a valuation of the lands and goods, but does not alter the estate, and by consequence the lessor

lessor may enter for a condition broken; and though by the extent the lands are seized into the king's hands, that is only a fiction in law, and is only with intent to do that which law and justice require, and it is not seized into his hands by way of possession, for if it was, then the entry of the lessor would not be lawful; and the court inclined that the entry was lawful, and gave the other a peremptory day to maintain his demurrer. 2 Roll. Rep. 468. 489. Mich. 22 Jac. B. R. Nicholas v. Simonds.

(P. d) *How he shall be said in, who enters for the Condition broke.
Of the same Estate.*

4 Rep. 120. [1. *Regularly, he shall be in of the same estate that he was when he parted with the possession.*]

9. in a note of the reporter, in

Dumpor's case, S. P.—D. 309. a. in pl. 75. S. P.—S. P. but this fails in respect of impossibility; as if a man seized of lands in the right of his wife makes a feoffment in fee by deed indented, upon condition that the feoffee should demise the land to the feoffor for his life, &c. The husband dies. The condition is broken. In this case the heir of the husband shall enter for the condition broken, but it is impossible for him to have the estate that the feoffor had at the time of the condition made, for therein he had but an estate in the right of his wife which by the coverture was dissolved, and therefore when the heir was enter'd for the condition broken, and defeated * the feoffment, his estate vanishes, and presently the estate is vested in the wife. Co. Litt. 202. a.

So in respect of necessity; as if cestui que use after the Stat. of R. 3. and before the Stat. 27 H. 8. had made a feoffment in fee upon condition, and after had enter'd for the condition broken; in this case he had but a use when the feoffment was made, but now he shall be seized of the whole estate of the land, so that, as in the former case, the ancestor had somewhat at the making of the condition, and the heir shall have nothing when he has enter'd for the condition broken, so in this case the feoffor had no estate or interest in the land at the time of the condition made, but a bare use, yet after his entry for the condition broken he shall be seized of the whole estate in the land, and that also for necessity; for by the feoffment in fee of cestui que use, the whole estate and right was divested out of the feoffees, and therefore of necessity the feoffor must gain the whole estate by his entry for the condition broken. Co. Litt. 202. a.—Br. Conditions, pl. 72. S. P. per tot. Cur. præter Cheyne, cites 4 H. 6. 2, 3.—Br. Entre Congeable, pl. 38. cites S. C. & S. P. held by all præter Cheyne.—Fitzh. Entre Congeable, pl. 1. cites S. C.—Br. Discontinuance, pl. 8. cites S. C.—3 Rep. 44. a. S. C. cited per Cur.

* [317]

The case of Warren v. Lee.—See infra, pl. 9. and the notes there.—[2. If an estate for life be upon condition, the remainder over, admitting it a good condition, if he enters for breach thereof, it shall defeat the remainder, because the livery is defeated. D. 3. Ma. 127. 54.] See (1. d) supra, pl. 3.

† In Roll, it is (upon devise for life upon condition &c.) which must be mis-printed—D. cites it as that case of 11 H. 7. 6. and neither in D. or in the year-book is any mention of the word (devise) but as to the defeating the alienation for the tail only and not the fee, Dyer says, quære hoc.

[4. *Lease*

[4. *Lessee for life makes a feoffment upon condition, and enters for breach, he shall be lessee for life, and reduce the reversion to the lessor.* * 8 H. 6. 3. b.] Br. Entre congeable, pl. 38. cites 4 H. 6. 2. 3. —Fitz.

Entre congeable, pl. 8. cites 4 H. 6. 2. S. P. — This seems mis-printed for 4 H. 6. 3. b. where the S. P. is by Fulthorpe, and admitted by Cheiney; but at H. 6. 3. is no such point. — 4 Rep. 44. a. cites 4 H. 6. S. P. — Co. Litt. 202. b. S. P. that he shall be tenant for life again, and subject to a forfeiture; for the state is reduced but the forfeiture is not purged. — Co. Litt. 252. a. S. P. — See (J. 4) supra. pl. 4.

[5. *If lessee for life infeoffs the reversion upon condition, and enters for breach thereof, he shall be lessee again, and the rent due to the lessor shall be revived.* 7 H. 6. 3.] Fitzh. Rent revive pl. 1. cites S. C.

[6. *Feoffment of two acres upon condition to enter into one, if he enters for breach thereof, it shall be but into one.* D. 3. Ma. 127. 55.] Such condition is good. Co. Litt. 202. b.

[7. *Lessee for life and the reverser joyn in a feoffment upon condition, reserved to the lessee; if he enters for breach thereof, this shall not defeat the entire estate.* D. 3 Ma. 127. 55.]

[8. *Devise for life upon condition, remainder over, (admitting it a good condition,) the entry shall defeat the remainder, though it is not created by livery, and the remainder may be without a particular estate by devise, for he ought to be in of the same estate which he had at the time of the devise.* † 29. Aff. 17. admitted, per Curiam. † Co. 9. [10] Ma. Port. 41. b. Contra, D. 3. Ma. 127. 54.]

land devisable in fee, and devised it by his testament to the clerk, upon condition that he shall have the land for term of his life, and that he shall be chaplain and shall chaunt for his soul during his life; and after his death, the land to remain to the commonalty of D. for ever, to find a chaplain for ever; and because the plaintiff had held the land for 6 years, and was not chaplain, the tenant as heir entered upon him. And it appeared by inspection that the demandant was of such age that he might have been chaplain immediately after the devise. And per Birton, the entry is lawful clearly; and by the entry for the default of the clerk, the commonalty have lost their remainder; for the heir by the entry cannot be seized of a less estate than fee simple; and after the justices excited the jury to say for the plaintiff, by which they said that the plaintiff was seized and disseised, and this was for conscience of the remainder as it seems, quære. Br. Conditions, pl. 111. cites 29 Aff. 17. — S. C. cited per Harper and Dyer, Pl. C. 412. b. in the case of Newys and Scholastica v. Larke. But see the said case as there cited, remarked up. in 10 Rep. 40 b. and see 2 Lev. 21. where 10 Rep. 40. b. is denied. — Fitzh. Affise, pl. 281. cites S. C. and 28 Aff. 71. — } 10 Rep. 41. b. Portington's case, the reporter says he had seen a report in Hill. 3 & 4 P. and M. moved by Dyer serj. in C. B. that Dr. Bute was seized in fee, and having 3 sons W. E. and T. devised part to his wife for life, upon condition that she educate his sons in learning and good manners, the remainder to T. his youngest son in tail. The reversion in fee descended to W. his eldest son. The condition was broken. The question was if the heir shall enter for the condition, or if T. should enter as for breach of a limitation, or if the condition be destroyed by the limitation of the remainder over; and it was resolved by Brooke Ch. J. and the whole court, that clearly this is no limitation, for they are express words of condition, and the intent of the testator was, that his heir (who always is to take advantage of a condition) shall enter and defeat the estate of the feme, but his intent does not agree with law, because he cannot defeat the estate for life, unless he defeats the remainder, and therefore by limiting the remainder over the condition is destroyed; but in such case his intent never was that he in remainder should enter for the condition broken. — D. 126. b. 127. a. b. Warren v. Lee, S. C. argued.

[9. *If a man leases for life, the remainder to another in fee, receiving a rent, upon condition that if the rent be arrear, to enter and remain for all the life of the lessee; if he enters for the condition broke, he shall defeat the remainder, and shall be seized in fee.* Dubitatur, 29 Aff. 17.] * [318] Br. Conditions, pl. 111. cites S. C. and that it was so said, but

that it was denied by Birton, but Brooke says, quære. — Fitzh. Affise, pl. 281. cites a. C.

10. *Tenant in tail made a feoffment in fee, and re-take estate in fee, and after was bound in a statute-merchant, and then made a feoffment in fee upon condition and died; the issue in tail within age enters for the condition broken, and was remitted by his non-age. Contra if he had been of full age; for then he should be adjudged in fee, as his father was when he made the feoffment upon condition, for he who entered for condition broken shall be in of the same estate as he was when he made the condition, at the time of the making thereof.* Br. Conditions, pl. 134. cites 8 H. 7. 7.

11. *Tenant in special tail has issue, and his wife dies. Tenant in tail makes a feoffment in fee upon condition. The issue dies, the condition is broken, the feoffor re-enters, he shall have but an estate for life as tenant in tail after possibility of issue extinct by the re-entry, and yet he had an estate tail at the time of the feoffment, and that also for necessity.* Co. Litt. 202. a. b.

12. *In some cases the feoffor by his re-entry shall be in his former estate, but not in respect of some collateral qualities; as if tenant by homage ancestrel make a feoffment in fee upon condition, and enters for the condition broken, it shall never be holden by homage ancestrel again; and so it is if a copyhold esbeaut, and the lord makes a feoffment in fee upon condition, and enters for the condition broken, and the reason in both these cases is; for that the custom or prescription for the time is interrupted.* Co. Litt. 202. b.

2 Rep. 86.
b. S. P.

13. *Every limitation or condition ought to defeat the entire estate, and not to defeat a part and leave part not defeated, and it cannot make an estate to cease quoad unam personam and not quoad alteram.* Per Cur. 6 Rep. 40. b. Mich. 3 Jac. B. R. in Finch's case.

14. *A. tenant in tail, remainder to B. in fee. B. bargains and sells the land to the king upon condition; afterwards A. dies without issue; the condition is broken. B. recovers the land by the condition, and yet by the bargain and sale he passed only a remainder; per Haughton and Doderidge J. and admitted by the counsel of both sides at the bar. 2 Roll. Rep. 60. Mich. 16 Jac. B. R. Hoddy v. Hoddy.*

[319] (Q. d) *Where on a Condition of Re-entry for Non-payment of Rent, and a Retainer till Satisfaction, the Profits after Entry shall be accounted as Parcel of the Satisfaction, and what Estate Feoffor gains upon such Re-entry.*

When A. is satisfied either by perception of the profits or by payment, or tender, and refusal, or partly by the one and

1. **W**HERE a feoffment is made reserving rent, &c. upon condition that if the rent be behind, the feoffor and his heirs may enter, and hold till satisfied, &c. By entry of the feoffor, the feoffee is not altogether excluded, but the feoffor shall hold and take the profits until he be satisfied, and then the feoffee may re-enter, and hold as before. For in this case the feoffor shall have the land but in manner as a distress until he be satisfied, &c. though he take the profits in the mean time to his own use. Litt. S. 327.

partly by the other, B. may re-enter. Co. Litt. 203. a. — But if it was not for the words (to hold till satisfied of the profits) it would be an inheritance in the land to remain in the heir as a penalty; but because of those words it is only a chattle and shall go to the executors, who are the persons to be satisfied of the arrears. Per Twissden. Lev. 171. Trin. 17 Car. 2. B. R. In case of *Jemmet v. Cooley*.

2. So if a man make a *lease for life*, with a reservation of a rent, and such a condition, if he enter for the condition broken, and take the profits of the land, quousque, &c. he shan't have an action of debt for the rent arrear, for that the freehold of the lessee continues. Co. Litt. 203. a.

3. But in case of *lease for years* reserving a rent, with a condition that if the rent be behind, that the lessor shall re-enter and take the profits, until thereof he be satisfied; there the profits shall be counted as parcel of the satisfaction, and during the time that he so takes the profits he shan't have an action of debt for the rent, for the satisfaction whereof he takes the profits. But if the condition be that he shall take the profits until the feoffor be satisfied, or paid of the rent (without saying thereof) or to the like effect; there the profits shall be accounted no part of the satisfaction, but to hasten the lessee to pay it, and as Littleton here says, that till he be satisfied, he shall have the profits in the mean time to his own use. Co. Litt. 203. a.

(R. d) Where upon Condition broken or unperform'd a Man shall be *adjudged in Possession* presently, *without Entry, Claim, or Demand*, and so upon the Performance, &c.

1. If a man infeoffs a feme, upon condition that if he will marry her he may re-enter, and he marries her; he may alien, for he has performed the condition, and by this he shall be enabled to alien; but quære how he shall be adjudged in after the marriage, if in jure uxoris or not, till he has made alienation, or done other act; it seems in jure uxoris. Br. Conditions, pl. 204. cites 5 E. 2.

2. If a man infeoffs another, and that upon condition perform'd [320] the feoffment shall be void, or that the feoffor may re-enter; in the one case nor the other upon the condition performed the franktenement is not in the feoffor till he has re-entred; quod nota. Br. Conditions, pl. 249. cites 11 H. 7. 2. per Brian Ch. J.

3. Estate of inheritance, as where estate tail is given on condition not to alien, &c. cannot cease without entry; but contra of estate for life; for this cannot be surrender'd by parol, and so may cease by such condition. Br. Conditions, pl. 83. cites 21 H. 7. 11.

4. As if I lease land for life or years, upon condition that if I pay to him 10 l. that his estate shall cease, there if I pay the 10 l. the estate is determined without any entry; contra of estate of inheritance; for this cannot cease till the donor, or feoffor, or his heir has entred. Ibid.

Regularly
when any
man will
take advan-
tage of a
condition,
† if he may
enter, he
must enter,
and when
he cannot
enter, he
must make
a claim; for
a freehold
and inheri-
tance shall
not cease
without en-
try or claim,

5. If land be granted for 5 years, that if he pay within the 2 first years 40 marks then he shall have fee, or otherwise but for 5 years, and livery is made. Now he hath a fee-simple conditional, &c. And if the grantee do not pay to the grantor the 40 marks within the first 2 years, then immediately after the said 2 years past, the fee and the freehold is in the grantor, *because the grantor cannot after the said two years immediately enter upon the grantee; because the grantee hath yet title for 3 years by the grant.* And so * because the condition of the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor; for if the grantee does waste, then after the breach of the condition, &c. and after the 2 years the grantor shall have his writ of waste. And this is a good proof then that the reversion is in him, &c. Litt. S. 356.

and also the feoffor or grantor may waive the condition at his pleasure. Co. Litt. 218. a.
* 1 Rep. 37. a. b. cites S. C. † Pl. C. 733. b. in case of *Browning v. Buxton*.

Pl. C. 133. 6. If I grant a rent-charge in fee out of my land upon condition, *Browning's*
bale. there if the condition be broken the rent shall be *extinct* in my land, because I (that am in possession of the land) need make no claim upon the land, and therefore the law shall adjudge the rent void without any claim. Co. Litt. 218. a.

8. P. 10 E. 7. If a man make a feoffment unto me in fee, upon condition to
4. 19. a. 20 pay him 20 l. at a day, &c. before the day I let unto him the land
H. 7. 4. b. for years, reserving a rent, and after I fail of payment, the feoffee
In pl. 12. by shall retain the land to him and his heirs, and the rent is determined
Pollard v. and *extinct*; for that the feoffor could not enter, nor need not claim
Taxley. upon the land; for that he himself was in possession, and the condi-
tion being collateral is not suspended by the lease; otherwise it is of
a rent reserved. Co. Litt. 218. a. b.

8. If H. grants an *advowson* to B. and his heirs, upon condition
that if A. &c. pay 20 l. on such a day, &c. the state of B. shall cease
or be utterly void; though A. pays the money, yet the state is not
re-vested in A. before a claim, and that claim must be at the church.
So it is of a *reversion* or *remainder* of a rent, or common, or the like,
there must be a claim before the state can be re-vested in the gran-
tor by force of the condition, and that claim must be made upon
the land. Co. Litt. 218. a.

9. If a man bargain and sell land by deed indented and enrolled with
a proviso, that if the bargainer pay, &c. the state shall cease and be
void. If he pays the money the state is not re-vested in the bargainer
before re-entry. Co. Litt. 218. a.

10. So it is if a bargain and sale be made of a *reversion*, *remain-
der*, *advowson*, *rent*, *common*, &c. Co. Litt. 218. a.

[321] 11. So it is if lands are devised to B. and his heirs, upon condition
that if B. pay not 20 l. at such a day, that his estate shall cease and
be void. The money is not paid. The state shall not be vested
in the heir before an entry; and so it is of a *reversion*, *remainder*,
advowson, *rent*, *common*, and the like. Co. Litt. 218. a.

(S. d) Entry.

(S. d) Entry. Barr'd by what.

1. IF a man infeoffs another upon condition to re-infeoff him within 40 days, there if the feoffor makes no request within the 40 days, the feoffee shall retain the land for ever. Br. Conditions, pl. 55. cites 19 H. 6, 67, 73. 76, Per Newton.

2. If the condition be broken for non-payment of the rent, yet if the feoffee brings an assise for the rent due at that time, he shall never enter for the condition broken, because he affirms the rent to have a continuance, and thereby waves the condition. Co. Litt. 211. b.

3. So it is if the rent had had a clause of distress annexed unto it, if the feoffor had distrained for the rent, for the non-payment whereof the condition was broken, he should never enter for the condition broken. Co. Litt. 211. b.

4. But he may receive the rent, and acquit the same, and yet enter for the condition broken. Co. Litt. 211. b.

5. But if he accepts rent due at a day after, he shall not enter for the condition broken, because he thereby affirms the lease to have a continuance. Co. Litt. 211. b.

(T. d) What shall be said a Condition to enlarge or encrease the Estate.

1. ASSISE by R. T. where it was found that M. leased the tenements to the plaintiff for 11 years, and in surety of it made a charter upon condition, that if he was disturbed of his term that he shall have the tenements in fee, which charter was delivered to keep, and to deliver according to the condition, and delivered seisin of this charter, and that M. sold within the term, and for the disturbance C. delivered the charter to the plaintiff, and livery of seisin was upon the one charter and the other, viz. upon the sale also, as it seems, by which it was awarded that the plaintiff recover; the reason seems to be, in as much as the seisin was upon the charter to the termor, for otherwise the condition had come too late, as it appears in *Plesington's case, 6 R. 2. Tit. quid juris clamat in Fitzh. 20. Br. Conditions, pl. 101, cites 10 Ass. 15.

2. If a man leases for life upon condition, that if the donor aliens in fee, that the lessee shall have fee, it is a good condition, by reason that the fee is in the lessor; per Frowike. But Brook says quære, because it seems that the law is contrary. Br. Conditions, pl. 83. cites 21 H. 7. 11.

3. And by Frowike, if I lease for years upon condition, that if I enter upon him then he shall have for life, it is a good condition. Ibid.

4. Where an estate is to encrease by force of a condition, the particular estate must continue in the lessee or grantee till the in-

* S. C. cited
Arg. 2
Brownl.
227. in case
of Stydson
v. Glais.

[322]
But the ab-
teration
the estate
create

of the lessor shall not prejudice the lessee or grantee. Pl. C. 483. b. Mich. 17 & 18 Eliz. in case of Nichols v. Nichols.

Pl. C. 486. b. Nichols v. Nichols.

2 Brownl. 248. Anon. S. C. adjudg'd accordingly. — But such increase of an estate by force of a condition precedent, must have these four incidents,

5. *Queen Eliz. seized of the reversion of an estate tail, granted the same to T. in tail, and further, on condition that if T. or his heirs pay at the Exchequer 20 s. that then he should have the said reversion in fee-simple.* T. paid the 20 s. resolved per tot. Cur. that the grant is good, and that such grant with condition precedent may be as well of things lying in grant, as of land which lies in livery, and may be annex'd to an estate tail, which cannot be merged, as to an estate for life or years, which may be merged by accession of a greater estate. 8 Rep. 73. b. 75. a. Trin. 7 Jac. Lord Stafford's case.

3d. A particular estate, as a foundation whereon to erect the greater estate. 2dly, Such particular estate must continue in the lessor or grantor till the increase happens. 3dly, It must vest at the time that the contingency happens, or otherwise it never shall vest. 4thly, The particular estate and the increase must take effect by one and the same instrument or deed, or by several deeds delivered at one and the same time, and not at several times. Resolved. But Coke Ch. J. said, that such foundation must be permanent, and not revocable at the will of the lessor or grantor. 8 Rep. 79. a. Trin. 7 Jac. Lord Stafford's case. — See Tit. Remainder (W) pl. 6, 7, 8, 9, and the notes there.

6. Where two jointenants are upon condition to have fee, and they make partition, they shall not have fee on the performance of the condition. Arg. 2 Roll. Rep. 402. Mich. 21 Jac.

(U. d) Declaration. And in what Cases Performance must be averr'd.

1. **A**SSISE of rent upon a grant made *perciendi apud W.* and if the rent be arrear, it should be lawful for the plaintiff to distrain in all his lands in W. M. and R. and the assise was brought in W. only, and the land in W. only put in view, and M. and R. were in another county, and yet good; for *apud, in, vel de tali tenemento* are good words of charge, and the writ was awarded good; by which the defendant said, that the grant is, that the plaintiff shall chaunt in the church of W. *pro animabus*, &c. or elsewhere, and said, that the plaintiff has not chaunted according to the form of the charter; and the plaintiff said, that he had chaunted according to the form of the charter, and good, without shewing in what place. Br. Assise, pl. 359. cites 41 Ass. 3.

2. Where a man is retained to go to Rome, or to serve in other service, he shall shew how he has done it; the reason seems to be, in as much as these things are executory. Br. Count, pl. 5. cites 3 H. 6. 33.

3. But *contra* of things executed; as if a man counts of a horse sold, he need not say that the defendant has the horse, for this is executed, and alters the property immediately. Ibid.

4. Where condition is comprised in an obligation or recognizance before the *in cuius rei*, or the end of it, and this gives cause of action.

Condition.

* 323

tion to the obligee, there in debt he ought to count of the condition performed; per Wangford, Prisot, Littleton, Needham and Ashton. Br. Count, pl. 52. cites 36 H. 6. 3.

* 5. But where the condition is indorsed upon the obligation, or written under the obligation, or the recognizance, he shall count simply upon the obligation or recognizance, and shall not say any thing of the condition; nota the diversity. Ibid.

6. In debt if the plaintiff counts upon condition contained in the obligation, as of 20 l. to be paid when the obligee has brought one hundred loads of hay to the house of the obligor in D. there the obligee ought to count in his count, that the condition is performed, and shew certain, because it is his advantage; contra if it be in his disadvantage, or be contained in the back, and not in the obligation; per Vavisor, quod non negatur. Br. Count, pl. 69. cites 21 E. 4. 36.

7. Debt upon obligation, with condition contained in the obligation, and not indorsed upon it; as where it is to save harmless a surety in another bond, there the count is good generally without saying that the defendant has not discharged him, nor saved harmless. Br. Count, pl. 73. cites 22 E. 4. 42.

8. For where the condition is contained in the obligation, and to be performed by the obligee; as if A. be bound to B. to pay him 10 l. if B. gives to A. such a horse, there B. ought to count that he has given the horse, &c. and otherwise ill. Ibid.

9. But where the condition is to be performed by the obligor, and contained in the obligation, there the obligee may count generally without saying that the defendant has not performed the condition; note the diversity. Ibid.

10. Where the condition is comprised in the obligation, and not indorsed, he shall count that he has performed it if it be to be done of the part of the obligee; contra if it be to be done of the part of the obligor, there the plaintiff shall not count of it. Br. Conditions, pl. 184. cites 22 E. 4. 42.

12. Debt upon an obligation upon condition, that if obligee delivers a bull to the obligor by such a day that then the obligation shall be good, and otherwise void; and, per Cur. except Shelly, the plaintiff ought to shew in his count that he has delivered the bull, and this because the condition arises on his part to make the obligation good, quod nota. Br. Obligation, pl. 1. cites 26 H. 8. 8.

This is misprinted, and should be 26 H. 8. 1. and so are the other editions.—Br. Dette, pl. 2. cites S. C.

—Br. Count, pl. 1. cites S. C.

13. The difference is between a precedent and subsequent condition; in the first case there ought to be averment of performance, but not in the other; for the estate, &c. is vested. Jenk. 260. pl. 59.

7 Rep. 10. a. Trin. 33. Eliz. C. B. resolved. Ughtred's case.

14. Where a condition consists of two parts, and one part is possible to be performed, and the other impossible, it is sufficient to allege the performance of that which is possible; per Clench and Popham. Cro. E. 780. pl. 14 Mich. 42 & 43 Eliz. B. R. Wigley v. Blackwall.

S. P. Arg. Palm. 315. as a condition to make a feoffment to A. in presence of B.

& C. and afterwards B. dies before the day, it shall be made in the presence of C.

15. He that pleads a *dispensation to hold in commendam*, confirmed by the king's charter, must aver the performance of the conditions contained in it. Heath's Max³ 37. cites Hob. 141, 142. [Mich. 10 Jac. in the case of Colt and Glover v. Coventry (bi-

* [324] shop) &c.]

Vent. 214.

Trin. 24.

Car. 2. S. C.

and Hale

Ch. J. was

now of opi-

nion that

the plain-

tiff's saying

paratus fuit

& obtulit to

do the work,

though he

did not say

(and the

other re-

fused) yet

it was a suf-

ficient aver-

ment after

a verdict;

wherefore,

though they would not agree in the other matter, yet judgment was given for the plaintiff.

2 Lev. 23 Opy v. Peters S. C. and though Hale Ch. J. and Twisden J. differed as to the other matter, yet as to the last all the court agreed, for that otherwise the jury would not have found for the plaintiff, and gave judgment for the plaintiff. 2 Saund. 350. S. C. accordingly, and judgment for the plaintiff.

8 Mod. 42.

S. C. cited

in case of

Lock. v.

Wright.

16. Assumpsit, &c. in which the plaintiff declared, that there was an agreement between them, *that the plaintiff should pull down two walls * and build an house, &c. for the defendant, and that the defendant should pay him pro labore in & circa divulsionem, &c. 80 l. &c. and lays mutual promises; and avers, that he was ready to perform all on his part, but that the defendant had not paid him the money.* After verdict for the plaintiff it was moved, that here the plaintiff had not averred that he had done the work. Hale Ch. J. held, that the words (*pro labore*) here makes it a condition precedent, and therefore the performance of the work ought to have been averred, though in case of a reciprocal promise it need not be. Twisden J. held, that there needed no averment there being reciprocal promises on which the parties have mutual remedies. But Rainsford agreed with Hale & adjournatur. Vent. 177. Hill. 23 & 24 Car. 2. B. R. Peters v. Opie,

17. B. agreed to pay 20l. six months after the bargain, A. transferring stock. A. at the same time gave a note to B. to transfer the stock, the defendant paying, &c. If A. sues upon this agreement, A. must aver and prove a transfer or tender, and the other a payment or tender; and though there are *mutual promises*, yet if one thing be the consideration of the other there a performance is necessary to be averred, unless a *certain day be appointed* for performance; per Holt Ch. J. 1 Salk. 112. pl. 1. Trin. 2 Anne; at nisi prius at Guildhall, Callonell v. Briggs.

(W. d) Pleadings in the Negative or Affirmative.

1. **D**EBT upon obligation to discharge a sheriff; it was held clearly, that the defendant may say that he has discharged him without shewing how; for he cannot shew a special discharge where he was not charged, but it is said elsewhere that *non damnificatus est* is a good plea. Br. Conditions, pl. 143. cites 5 E. 4. 8.

2. *Contrà* it is where he is bound to be nonjust of all actions against the plaintiff, there he shall shew the record in certain; for this is his own act. Ibid.

3. The indenture is that he shall serve the plaintiff by 10 years, *sine absentatione, nisi per specialem licentiam querentis*; and he said that he had served by ten years *sine absentatione, nisi per specialem licentiam querentis*, and did not shew at what time he licenced him; and

and the court held the plea in this good, because it *insues the words of indenture*, and it may be that he licenced him several times. Br. Conditions, pl. 144. cites 6 E. 4. 1.

4. Where a man is bound to give *all the money in his purse*, and he says that he gave him no money, it is good, without saying what money he had in his purse; otherwise it is where he pleads in the affirmative, that he gave but 10l. which was not all, this is not good; for he ought to say what money he had in his purse. Br. Conditions, pl. 133. cites 17 E. 4.

5. If a man be bound to give *J. N. all the money which is in his purse, or to infeoff him of all the land which descended to him from the part of his father*, he ought to shew how much money and how much land, &c. cites 17 E. 4. 5.

6. In error, an abbot granted a *coredy* to W. S. and shewed what, &c. to be of good conversation, and to do such services as N. who had it before did; and he said that he was of good conversation from the time of the grant aforesaid, &c. For the law intends that every one is of good conversation till the contrary be shewn; and therefore if he be otherwise, the other shall shew it, and therefore good by all the justices; Br. Conditions, pl. 168. cites 22 E. 4. 28. [325]

7. And to the other point he said, that he had done all such services as N. had done, and did not shew what services, and yet good by the best opinion; for the condition is general, and not certain, and shall not shew what services N. did. Ibid.

8. But where the condition is certain, as to perform the award of J. N. there he shall shew certain what award J. N. made, and that he has performed it; nota diversitatem, per Curiam; for in the case above it is so incertain that it cannot well be shewn in certainty. But the other party replied, and shewed in what he had broken. Ibid.

9. In debt upon an obligation with condition (*inter alia*) for the obligor to account; to which the defendant pleads condition performed. The plaintiff replies, that the defendant did not account, and ill, because he shews not what he had to account for; and difference is taken, when the condition is in the negative, not to do a thing, then it is sufficient to say he did not do it; and when in the affirmative, to do, as to perform his office, or to infeoff him of all his land, &c. there he must shew what his office was, and what lands he had, and that he did infeoff, &c. Heath's Max. 53. cites Mich. 2 R. 3. fol. 17. Placito 44. & Trin. 4 H. 7. Placito 6.

10. In debt upon an obligation the condition was, that if the defendant pay the plaintiff for so many loaves as shall be delivered to J. N. when he shall be required; that then the obligation shall be void; the defendant said that he was never required by the said plaintiff to pay him any money for any bread delivered, &c. and because by this plea, that he was never required to pay for any bread delivered, in which it is imply'd that bread was delivered, he shall not shew the certainty of the bread delivered, and therefore it was adjudged per Cur. in anno 5 H. 7. 8. that the plea is not good, quod mirum! for by the reporter the plea is good; for he has liberty to say that no bread was delivered, or to say that he was not required

as above; and per Keble, because he pleads in the negative it suffices; contra if he had said that he had paid for all the bread, &c. there he shall shew how much was delivered, and pursue the words of the condition verbatim, &c. and the whole court was against him; quod mirum. Br. Conditions, pl. 129. cites 4 H. 7. 12.

11. And per Keble there is a *diversity* where a man pleads in the affirmative, and where in the negative; for in the affirmative he ought to plead certain; as where a man is bound to keep J. N. without damage, if he pleads in the affirmative he ought to plead certainly, how he has kept him without damage, as by release, payment, or the like in certain. *Contra* where he pleads in the negative, as non damnificatus fuit, there he need not allege certainty. Ibid.

12. So where a man is bound to stand to an arbitrement, nullum fecit arbitrium suffices in the negative; but if he pleads in the affirmative, that he has performed the award, he shall shew what the award was in certain. Ibid.

Debt upon obligation, conditioned to save the defendant and his lands in S.

13. Condition in the affirmative which implies a negative shall be pleaded performed in the negative. As where a man is bound to keep W. N. without damage against J. S. he may say that J. S. non damnificavit dictum W. N. Br. Conditions, pl. 240. cites 10 H. 7. 12.

from an annual rent of 20 l. reserved upon a lease thereof made by one J. C. to J. B. The defendant pleaded that a tempore confessoris scriptis obligatorii exoneravit, & indemnum conservavit the plaintiff and his lands from the said rent; the whole court held that the plea being in the affirmative is ill, because he did not shew how he saved him and his lands harmless. But if he had pleaded in the negative, non damnificatus, it had been good, and judgment for the plaintiff. Cro. J. 634. pl. 7. Still. 19. Jac. in B. R. Horfeman v. Obbins.——2 Mod. 239. App. S. C. cited.

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14. Where a man pleads that he has saved him harmless, it is no plea without shewing how, because he pleads in the affirmative; contra where he pleads in the negative, as non damnificatus est. Note the diversity. Br. Conditions, pl. 16. cites M. 37 H. 8. per Cur.

15. Debt upon obligation the condition was, whereas the defendant was made sub-collector of the subsidy by the plaintiff, if he gave a sufficient account, and saved him harmless of those receipts against the queen, and procures a sufficient acquittance or discharge out of the Exchequer, &c. The defendant pleaded that he had accounted, and saved harmless the plaintiff, and had procured him an acquittance; it was moved that the plea was not good, for that being in the affirmative, he had not shewed how. Gawdy J. said, if the discharge be to a particular thing he must shew how, but not when it is to multiplicity of things; for there a general pleading is good, and cited 5 E. 4. 8. sed adjournatur. Cro. E. 253. pl. 24. Mich. 33 & 34 Eliz. B. R. Acton v. Hill.

16. Debt upon bond conditioned, that the defendant should at all times, upon request, deliver to the plaintiff the fat and tallow of all beasts which he, his servants, or assigns, should kill or dress before such day. The defendant pleaded, that upon every request made to him he delivered to the plaintiff the fat and tallow of all beasts which were killed by him or his servants or assigns before the said day. Ex-ception

ception was taken that the plea was too general, but all the court held it a good plea; for when the *matter* to be pleaded *tends to infiniteness and multiplicity*, the law allows of a general pleading in the affirmative, and for that reason allows of the rule that he who pleads in the affirmative shall allege performance of covenants generally. Cro. E. 749. pl. 3. Paich. 42 Eliz. B. R. Mints v. Bethell.

17. Bond was conditioned *not to kill any pheasants or partridges*, &c. in such a place. The defendant pleaded that he had not killed; the plaintiff replied that he had killed a pheasant, *et hoc paratus est verificare*. Sid. 241. in pl. 4. Mich. 19 Car. 2. B. R. Arg. cites it to have been adjudged till upon demurrer; for it should have concluded with *petit quod inquiratur per Patriam*.

(X. d) Pleadings. In what Case there must be Profert or Monstrans of Deeds.

1. IF a man pleads condition of franktenement in action real or personal, he shall shew deed. Br. Conditions, pl. 220. cites 4 E. 3. 34, 35.

2. In assise, an estate upon condition was found by verdict at large, and for the condition broken the plaintiff, as heir of the donor, entered, and the entry adjudged good, and yet this was not pleaded, nor deed shewn; but it appears there, that if he who entered had not a deed to prove the condition he cannot enter; and it seems also there, that he cannot plead the condition without shewing deed thereof; quod nota. And so it appears in Littleton, Tit. Estates; Br. Monstrans, pl. 99. cites 33 Aff. 11.

3. In debt upon an obligation of 40 l. conditioned to pay 5 l. the defendant may plead payment of the 5 l. by averment, without shewing any speciality. Br. Conditions, pl. 23. cites 42 E. 13. [327]

4. Condition may be pleaded of a contract, without shewing deed. Br. Monstrans, pl. 149. cites 44 E. 3. 27.

5. Audita querela upon defeasance by indenture to make certain payments, and that then the estate shall be void, and avers the payments without shewing acquittance in writing, and good per Cur. Because the covenants were comprised in the indenture, for then the matter may be averr'd. Br. Monstrans, pl. 151. cites 46 E. 3. 33.

6. In trespass, a man may plead a feoffment upon condition of re-entry, and may enter for the condition without shewing deed; *contra in actiones real*; the reason seems to be, in as much as the franktenement shall not be recovered in trespass. Br. Monstrans, pl. 135. cites 7 H. 6. 7. Ibid. pl. 117. cites 9 H. 6. 23. copiam.

7. In detinue of a deed the plaintiff may aver, that he delivered the deed to the defendant upon certain conditions to be performed, to deliver it to the obligee, and otherwise to the plaintiff, who is obligor. Br. Monstrans, pl. 136. cites 8 H. 6. 26, per Babb. Martin and Cottelmore.

8. Sq

8. So against obligor, if the bailee delivers them to the obligee contrary to the condition; per Babb. Martin, and Cottelmore. Br. Monstrans, pl. 136. cites 8 H. 6. 26.

9. But in debt by obligee against the obligor he shall not aver such condition without writing; per Babb. Martin, and Cottelmore. Br. Monstrans, pl. 136. cites 8 H. 6. 26.

10. In trespass the usage has been, in ancient time, that a man may plead *condition of estate de facto in actionibus personalibus*, as trespass &c. without shewing deed, and e contra in actionibus realibus, for there it was used to shew deed; but at this day, and of late time, it has been used to shew deed in the one case and in the other, per the justices. Br. Monstrans, pl. 114. cites 4 E. 4. 34, 35.

He must
shew the
indentures,
per Cur.
Ibid. pl.
246. S. P.
cites 6 H.
7. 12.—
Quere, for
by several
contra. But 7 H. 4. 1. agrees with the court; quod nota bene. Ibid.

11. In debt, the defendant shewed a condition indorset, that if he performed covenants in certain indentures, &c. that then, &c. and shewed how he had performed them, and the plaintiff replied to it, and so to issue, and good without shewing of the indenture, by reason that the plaintiff did not demur for the not shewing, but replied to it; and e contra, per Choke, if the plaintiff had demurred. Br. Monstrans, pl. 116. cites 6 E. 4. 1, 2.

12. Debt upon obligation, the defendant pleaded condition, that if J. P. served the plaintiff for one year, &c. and for 7 years proximo, &c. in omnibus mandatis suis litibus, quod tunc, &c. and that the said J. P. served the plaintiff lawfully from this day till such a day within the 7 years, at which day the plaintiff discharged him from his service; judgment, &c. And a good plea without shewing deed of the discharge, notwithstanding that it was upon obligation, in as much as the condition is matter in fact. Br. Conditions, pl. 152. cites 10 E. 4. 43.

13. In assise between feoffee and feoffor, the feoffee shew'd a deed poll in pleading; the feoffor may deny that the feoffment was upon condition, and shew the performance or breach of it, by which he enter'd without shewing counterpart or otherwise, and yet the deed belonged to the feoffee, and not to the feoffor. Br. Monstrans, pl. 157. cites Littleton, fol. 90 & 91.

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14. There is a difference between the pleading of a condition comprised in a will and in an estate or grant made by a man by livery, where the estate is executed in his life; for in the first case, to plead the condition to defeat the estate, he need not have any deed, but in the other he ought. Dy. 127. b. pl. 56. Hll. 2 & 3 P. & M.

15. A man cannot plead a condition to defeat a freehold without shewing a record or deed to prove it; but a condition to defeat the grant of a chattel he may. Litt. S. 365.

Co. Litt.
225. a. b.

16. He that pleads a deed to defeat a freehold, ought to shew it to the court, that the court may judge whether it have legal words, and of ancient time the court, on view, judg'd it void if raz'd or interlin'd in places material; but now it is left to be tried by the jury, whether it were done before delivery. The deed itself must be shewn; nor can any inrolment thereof, or exemplification under the great seal be pleaded; but by statute a *conflat* or *inspeximus* of letters patents made since the 27 H. 8. may be pleaded by the king's patentees, or any claiming under them, as well against the king

as any other. A *condition*, &c. can only be of the inrollment of record, but not of a deed or any other writing that is not of record; nor can a deed be inroll'd till duly acknowledg'd. Hawk. Co. Litt. 311.

17. Those that come in by act of law, as *tenant in dower*, Co. Litt. *statute-merchant*, &c. may plead a condition without shewing the deed; but *tenant by curtesy* cannot, for the law presumes that he had the possession of his wife's deeds, and he may keep them during his life; nor shall the lord by *escheat*, because the deed belongs to him; nor any that claims by *coveyance* from the party, or justify as *servants* by his command, &c. plead a condition without shewing the deed. Hawk. Co. Litt. 311.

18. *Tenant in tail* makes a feoffment on condition; re-enters, Co. Litt. and dies; his *issue* being remitted needs not in pleading this special matter shew the deed, for he by the remitter claims above the condition. Hawk. Co. Litt. 312.

19. *Tenant to a præcipe* pleads in abatement of the writ (for *Co. Litt. non-tenure*) that J. S. infeoffed him on condition, and re-enter'd, and was not compell'd to shew the deed, because the demandant was a stranger, nor did the tenant make himself a title against him by force of it, and it may be, that on the re-entry the deed might be given up to the feoffor. Hawk. Co. Litt. 312.

20. The lessee of a mortgage, evicted by the mortgagor, may in an action of debt for the rent by mortgagee, shew the condition and re-entry without deed, for he is no way privy to it; and if the feoffee after a re-entry by the feoffor, for condition broken, enter and take away the deed and detain it, the feoffor in an assise brought against him shall not be enforced to shew the deed, for the feoffee shall take no benefit of his own wrong. A woman may in pleading aver a feoffment to be *causa matrimonii prælocuti*, albeit she have not any writing to prove it. Hawk. Co. Litt. 312.

21. If the deed remain in one court, it may be pleaded in another without shewing forth *quia lex non cogit ad impossibilia*. Co. Litt. 231. b.

22. In *debt on bond*, defendant pleads a condition for performance of covenants, contained in certain indentures between them. Per Coke, this is a clear fault and without defence; for he ought to have pleaded thus, viz. to have shewed the indenture and to have said *hic in Cur. prolat'*, and this exception to the plea is unanswerable (it being therein urged further, viz. that the defendant is privy to the indenture) and judgment accordingly. 2 Bull. 259, 260. Mich. 12 Jac. Duport v. Wildgoose.

23. In *debt on bond* defendant demanded oyer of the condition which was to perform covenants in an indenture, and then demanded oyer of the indenture; plaintiff gave oyer, omitting an indorsement which was made before the execution of the deed; on this oyer defendant pleaded performance; the plaintiff replied, and set forth the indorsement, and prayed judgment for the variance. Per Cur. & 11, The defendant should have set forth the indenture himself, being a party to it, and should have pleaded performance to all the covenants therein. 2dly, The plaintiff was not obliged to give oyer

Roll. R. 209
S. C.

* [329]
6 Mo. 237.

& C. adjudged.

The de-

fendant shall

shew the in-

denture if

the plaintiff

demands oyer

of it, per

tot. Cur.

Br. Mon-

of

trans. pl.
28. cites 7
H. 4. 1.—
Ibid. pl. 9.
cites 28 H.
6. 7.—

So if plain-
tiff makes
title by a
conditional
lease, he
may plead
the lease
without the condition.

of the indenture, and though he did, yet it being what he need not do, the setting it forth is not at his peril, as where he is obliged to set it forth; nor is he concluded to say, that there is more contained in the indenture, but is at liberty as well as if the defendant himself had set it forth; and the court held, that as the defendant was bound to set it forth, so he was bound to supply this omission, and make his plea compleat, and therefore judgment for the plaintiff. 2 Salk. 498. pl. 6. Mich. 3 Anne B. R. Cook v. Remington.

Arg. Le. 306. in the case of Carter v. Chappell;

† Keilw. 21. pl. 72. per Frowke.

(Y. d) Pleadings.

1. **A** MAN cannot avoid a statute-merchant, obligation, release or the like, against the comisee himself named in it, and who shall take advantage of it, to say that it was upon condition. Br. Condition, pl. 25. cites 47 E. 3. 27.

Br. Condi-
tions, pl. 21.
cites S. C.

2. *Contra in detinue against a third person*, where there is livery in indifferent hands, note the diversity. Ibid:

3. Debt upon indenture, which comprehended several conditions of the part of the defendant, and for non-performance of any of them, that the defendant should forfeit 40 l. and the plaintiff counted that all are broken, and the defendant answered that No; and the plaintiff shewed one certain, and the issue shall be upon this only by the opinion of the court; but Brook says, it seems that this is not the course of pleading at this day; quod vide. Br. Count, pl. 3. H. 6. 8.

Ibid. pl. 22,
cites 34 H.
8. and dis-
tinguishes
between a
defeasance
to a stranger
and to one co-obligor.

4. *B. gives bond to A. Afterwards A. by indenture grants to J. S. that if J. S. performs certain conditions, the bond given by B. shall be void.* J. S. performed the condition, yet per optimam opinionem, B. shall not plead it in debt by A. against B. Br. Estranger al Fait, pl. 1. 3 H. 6. 18. 26.

5. If A. be bound to B. to make him a sufficient estate in such lands; in an action brought upon such obligation it is no plea to say, that he hath made to him a sufficient estate, &c. but he ought to show what estate. Arg. 2 Le. 39. ad Finem, in pl. 52. cites 22 H. 6.

Br. Dette,
pl. 75. cites
S. C.

6. Debt upon an obligation of 20 l. to pay 10 l. by a day, the defendant said, that he paid it to J. N. by the day by the command of the plaintiff, and no plea, by which he said, that he paid it to the plaintiff by the hands of J. N. and a good plea. Br. Conditions, pl. 12. cites 27 H. 6. 6.

7. In debt the defendant pleaded defeasance that where the plaintiff was indebted to S. H. in 100 l. by obligation, that if the defendant shall obtain the same obligation and deliver it to the plaintiff, or sufficient acquittance of it, that then, &c. and he said that he had dis-
charged

charged him, &c. and the plaintiff demurred, and because he did not shew how he discharged him, therefore no plea, and the plaintiff recovered his debt and damages * per judicium. Br. Conditions, pl. 16. cites 35 H. 6. 19. & concordat H. 22. E. 4. 42.

8. In debt upon an obligation the plaintiff declared, that the obligation was made for such a duty, and the defendant said that it was made for another duty *absque hoc* that it was for this duty, and the others *e contra*. Br. Obligation, pl. 48. cites 4 E. 4. 30.

Br. Issues
Joins, pl. 35.
cites S. C.

9. If it was to infeoff the plaintiff of all lands contained in a certain fine, and said that four acres are in the fine of which he has infeoffed him, this suffices without saying that these are all, &c. Br. Conditions, pl. 144. cites 6 E. 4. 1.

10. *Contra* if it be referred to the matter in fact and in certainty, as to infeoff him of all his lands of which his father died seized, or of all his lands in A. there he shall shew how much the land is, and that he infeoffed him thereof, which are all the lands and tenements, &c. *Ibid*.

11. In debt upon obligation, the defendant pleaded a condition, that if J. P. serve the plaintiff for one year, &c. and so for seven years next, &c. in omnibus mandatis suis licitis, quod tunc, &c. and that he said J. P. served the plaintiff lawfully from that day to such a day within the seven years, when the plaintiff discharged him of his service. The plaintiff said, that such a day, before the discharge, he commanded the said J. P. to keep such goods without alienation, and the said J. P. aliened them to T. N. And the defendant by protestation that he did not alien, for plea saith, that the plaintiff did not command J. P. to keep the goods, and a good rejoinder per tot. Cur. for the defendant was not servant to the plaintiff, and also he is bound that J. P. shall do all the commandments specially; and therefore this is the very point of the condition; but *contra* if he was bound, that J. P. should be a good and lawful servant; and where a man is bound to serve in all commandments, there he is not bound to serve if he be not commanded. Br. Conditions, pl. 152. cites 10 E. 4. 15.

12. If one be bound to repair such a house, it is not sufficient to say that he has repaired it, but he ought to shew in *hoc vel in illo*. Arg. 2. Le. 39, 40. cites 7 E. 4.

13. If a man be bound upon condition, that the plaintiff shall have licence of one J. N. to carry 20 load of wood out of his wood, it suffices for the defendant to plead that J. N. at his request licensed the plaintiff, &c. without saying that the plaintiff was not disturbed; for he is not bound to plead more than is in his condition; for if there was disturbance it shall be of the part of the plaintiff by the best opinion, and so he did. And so it seems that where a man is bound to licence, he cannot countermand it after; *contra* if there was no bond. And if a man be bound as above that the plaintiff shall have licence, there if he be disturbed by any, the bond is forfeited. But if it was that J. N. shall give him licence, which he does, and a stranger disturbs him, there the bond is not forfeited; and so see a diversity between (shall have licence, and shall give licence). Br. Conditions, pl. 163. cites 18 E. 4. 18. 29.

Br. Licence,
pl. 13. cites
S. C.

14. Where

14. Where the defendant is bound to suffer the plaintiff to enter and to have all the fallows in D. he shall shew how many fallows there were. Br. Conditions, pl. 177. cites 21 E. 4. 63.

15. But when he is bound to repair all the houses in D. it suffices to say that he has repaired all the houses. Ibid.

[331] 16. Where condition is to do certain things, the defendant may shew the condition certainly, and says that he has performed all the conditions generally, and if the plaintiff denies it, he may shew in what point certainly he has broke the condition, and from this the issue shall rise; per Hussey and Vavisor, but Suliard contra, and that the defendant ought to plead certainly how he has performed the condition, and the plaintiff shall take issue thereupon at his peril, but the defendant shall not plead generally that he has performed the condition, but shall shew certainly how, and so is the use at this day. Br. Conditions, pl. 180. cites 22 E. 4. 14, 15.

17. But per Hussey, if I am bound to J. N. to save him harmless, &c. I may say generally that I have saved him harmless, and good. But if I am bound to acquit or discharge A. B. against J. S. there he shall shew certainly how he has acquitted or discharged, and therefore it seems by him that non damnificatus est is a good plea. Ibid.

Br. Dette,
pl. 172. cites
3, C.

18. Debt upon obligation of 20 l. upon condition to pay 10 l. the defendant said that he paid 5 l. to the bailiff of the plaintiff by his command, and [as] to the [other] 5 l. he said that he offered it to the plaintiff, and because the plaintiff was indebted to the defendant in 5 l. he commanded him to retain it in satisfaction of it, and it is a good plea, and this notwithstanding that it was not by writing; for condition may be averred by parol to be performed, and e contra of single obligation. Note a diversity. Br. Conditions, pl. 181. cites 22 E. 4. 25.

19. Condition of an obligation to shew a sufficient discharge of an annuity, you must plead the certainty of the discharge to the court; the reason whereof given by Brian and Choke is, that the plea there contains 2 parts, one a trial per pais, viz. the writing of the discharge, the other by the court, viz. the sufficiency and validity of it, which the jury could not try; for they agree that if the condition had been to build a house agreeable to the estate of the obligee, because it was a case all proper for the country to try, it might have been pleaded, and then it was a demurrer, nor an issue, as it is here. Hob. 107. per Hobart Ch. J. cites 22 E. 4. 40.

20. In debt upon an obligation conditioned that the defendant shall repair and do other things, and also pay his rent every day of payment. He pleaded performance of all conditions and payments generally. The court at first thought the plea good, but afterwards on seeing the books they thought he ought to plead performance specially. Kelw. 95. b. pl. 3. Mich. 22 H. 7. cites Mich. 1 H. 7.

21. But where the condition refers to such a generality, that by intendment it is past the remembrance of man, as if the under-sheriff is bound to discharge his master from all accounts and returns of writs within the county, it suffices to plead performance of the condition generally. Per Cur. Kelw. 95. b. pl. 3. Mich. 22 H. 7. cites 1 H. 7.

22. Where

22. Where a man is *direct party to the performance of a condition*, he ought to plead specially; as if it be *to infeoff the plaintiff of all his lands*; agreed. Kelw. 95. b. pl. 3. Mich. 22 H. 7. cites 1 H. 7.

23. Condition of obligation was, *that the obligor shall not enter nor claim such a house*; and the defendant said that he did not enter nor claim. Per Keble he claim'd, Prist; per Brian he ought to say that he came to the land, and claimed the land, and entered into it, and yet nothing of the entry shall be traversed, but only the claim; quod nota. Brook says, quære of this opinion; for there he alleged both points of the condition, &c. and also it seems that he ought to say what year and day he claimed. Br. Conditions, pl. 130. cites 4 H. 7. 13.

24. In debt if the defendant pleads condition of the obligation *indorsed*, he ought to allege all performed; but the plaintiff shall shew one only broken, upon which the issue shall be taken. Br. Conditions, pl. 131. cites 5 H. 7. 7.

25. A. is bound to B. in 50 l. to make such estate as the counsel of B. should devise; A. pleaded that the counsel denied advisement, the plaintiff shall not reply prist, that they did, but shall shew specially what devise his counsel made, and who made it, and the defendant shall repoin that there was no such devise, prout, &c. Br. Replication, pl. 35. cites 6 H. 7. 4.

26. In debt, a man is bound in 100 l. to make estate to J. S. of land or tenements to the yearly value of 10 l. by such a day. [The defendant pleaded] that he infeoffed him of the manor of A. in the county of S. and of the manor of D. in the county of W. before the day, which are in value 10 l. And per Brian he ought to allege the particular value of each manor by itself, by reason of the visne; for otherwise, if he says that the manors are not of the value of 10 l. per ann. it shall not be tried by both counties; and Townsend agreed; by which he said accordingly. And the plaintiff said that he made estate of the one manor before the day, and good. Br. Conditions, pl. 244. cites 11 H. 7. 14. [332]

27. Debt upon obligation, the defendant said that it is *indorsed with condition*, that if he found J. S. sufficient meat, drink, and apparel, till 21 years of age, that then, &c. and he said that he had found him sufficient meat, drink, and apparel, during the time at D. and held a good plea, notwithstanding that he did not shew what meat drink and apparel he found: Per Keble said that he did not find sufficient apparel during the time aforesaid, and dared not take issue upon all the points for the doubleness, but took issue upon the whole time, and good; per Cur. quod nota. Br. Conditions, pl. 138. cites 12 H. 7. 14.

28. If the condition of an obligation be *to make to the obligee a lawful estate in certain land*, it is safe to plead that he was infeoffed himself thereof, the which is a lawful estate, though ex rigore juris it is not necessary, because it appears to be a lawful estate. Kelw. 95. b. pl. 2. Mich. 22 H. 7.

29. But if the condition be *to build a sufficient house*, the defendant must say, that he has built such a house, and conclude that the same is sufficient. Kelw. 95. b. pl. 2. Mich. 22 H. 7.

30. In debt upon an obligation conditioned *to deliver all evidences concerning such lands*, the defendant must plead that he has delivered such and such charters which are all the charters concerning the same land. Kelw. 95. b. pl. 2. Mich. 22 H. 7.

31. A scire facias issued upon a recognizance to perform covenants, whereof one was *to permit his tenants to have common in the open fields of D. when they should lie fallow*; and another was, *that he would not do, permit, or cause to be done, any act to alter the course of the fields in D. into any other plight than at this time was used*; the defendant said that he had permitted, &c. and that he had not altered the course, &c. The opinion of the justices was, that this general pleading was very good and so it was ruled; but Harper totis viribus e contra. D. 279. pl. 6. Mich. 10 and 11 Eliz. Anon.

S. C. cited by L.J. Ch. B. Gilbert, Gilb. Equ. Rep. 254. in the Exchequer in Ireland, and says that when the

condition consists of matters to be done, that lie within his own knowledge, there though they consist of great variety, yet he cannot plead generally, but must shew the particular performance of all matters in his plea.

32. The condition of an obligation was, *that the defendant, bailiff of the plaintiff's manor, should render an account before such a day of all the rents of the manor he has received*; the defendant pleaded that before the said day, he had accounted for all the rents which he had received, but because he did not shew what he had received, it was adjudged to be ill. Cro. E. 749. in pl. 3. cites Hill. 37 Eliz. B. R. Sands v. Maleverer.

33. In debt upon an obligation conditioned *for the payment of 70 l. viz. 35 l. at one day, and 35 l. at another day*, the defendant pleaded *payment of the 70 l. secundum formam & effectum conditionis præd'* and the court held it well enough, for reddendo singula singulis, 'tis as if he had pleaded the several payments at the several days. Cro. E. 281. pl. 1. Trin. 33 Eliz. B. R. Fox v. Lee.

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Cro. E. 727. pl. 63. Mich. 41 and 42 Eliz. C. B. Lane v. Goldman, S. C. says the whole court held it a good issue and well triable; for

the condition being in the disjunctive, he may allege the one or the other at his election; and this power of speaking, &c. shall be proved upon the evidence by such as heard him recite it; but the most apt and proper issue had been, that he had a son *qui locutus fuit*, and so have tried a thing actually done.

34. In debt upon a bond on condition *to pay 20 l. within a month after the obligee had a son, that did or could speak the Lord's Prayer in English, that he could be understood*; the plaintiff pleaded that he had a son, *qui loqui potuit precationem domini ut intelligi potuerit*; and the defendant demurred, because it was pleaded he had a son *qui loqui potuit*, for that is a secret ability that cannot be known; Anderfon Ch. J. and Kingmill, and Glanvill J. held the issue good; but Walmesley contra, that it is a secret thing and cannot be tried. Ow. 127. Lane v. Cotton.

35. The rule is *non sunt longa quibus nihil est quod demere possis*, and therefore the length of the defendant's plea is unavoidable, where it is impossible to make it shorter; but where it lies as well on the knowledge of the plaintiff as the defendant, there the unnecessary prolixity is avoided, if the defendant pleads generally according to the words of the condition, and it comes on the plaintiff's part to allege a breach. But where there is no such prolixity in the defendant's plea.

plea, there be cannot depart from the rule by shewing a general performance, according to the words of the condition, but he must plead it especially, by shewing in certain how it is performed, or else does not plead a proper and substantive bar, according to the rule of law, by which he should confess, and avoid the plaintiff's declaration; as if the condition be, *that the defendant pay the plaintiff all manner of costs and charges that J. S. shall charge the plaintiff with for carrying on a suit*, the defendant pleads he did pay all manner of costs and charges; this is ill because it relates to one single point, which may and ought to be shewed in certain, in order that the plaintiff may take issue on it. Gilb. Equ. Rep. 254. cites Lutw. 419. [Trin. 4 Jac. Parkes v. Middleton.]

36. Condition was to pay the plaintiff at his full age all such legacies and gifts, which were given him. In debt upon this bond, the defendant pleads that he has paid *omnia talia legata qualia ad tale tempus generally and without shewing in particular*, and in certain when, nor what, and therefore it was objected that the plea is void for uncertainty. Williams J. held that he ought to have shewed certainly in his plea, what he had paid and when, and also the time when he came to his full age specially in his plea, according to the condition of the obligation, and this the clear opinion of the whole court. Bullst. 43, 44. Mich. 8 Jac. Stone v. Blisse.

37. If the condition of a bond be to discharge a mortgage of all incumbrances, one may plead generally that he did discharge it of all incumbrances, but if it be discharged of such a lease, then I must shew how. 1 Brownl. 32. Pasch. 10 Jac. Anon.

38. Debt on bond for payment of children's portions *tam cito as they should come to the age of 21 years*; the defendant pleaded that he had paid them *tam cito as they came of age*; Doderidge J. said that the time being uncertain, he ought to shew in his plea certainly when they came to the age of 21 years, and when he paid the money, and also ought to have shewed who made the will, and how he had performed the same, so as the same might appear judicially to the court; whether well performed or not, and judgment for the plaintiff. 2 Bullst. 266, 267. Mich. 12 Jac. B. R. Haulsey v. Carpenter. Cro. J. 359. pl. 20. Haulsey v. Carpenter, S. C. adjudged accordingly.

39. Condition was that the obligee should enjoy an estate according to a grant of letters patents, he must not plead it *hæc verba* but he must shew the effect of the letters patents, and the enjoying accordingly. Per Hobart Ch. J. Hob. 295. Mich. 15 Jac. in case of Slade v. Drake.

40. Condition of the obligation was, that the obligor should surrender his copyhold land to the use of the obligee, and he pleaded that he had surrendered it, and upon that plea, the plaintiff demurred, and it was adjudged, upon the opening of the case, by Warberton and Hutton, being only present in the court, that judgment shall be given for the plaintiff, for the plea in bar is not good, because the defendant had not shewed when the court of the lord was holden. Win. 11. 19 Jac. Lewelling's case. [334]

41. If a man is bound to give all the money in his purse, or to infeofee one of all his lands, he cannot plead that he has given all the money

money or land, but he ought to shew certainly what money or land he had, and that he had given it. Lat. 16. Pasch. 2 Car. Wilkin-son's case.

42. Debt upon bond to make satisfaction for all goods that an apprentice shall waste; in the replication the plaintiff assigned a breach, that the apprentice had wasted several goods, to the value of 100 l. Exception was taken, that the replication did not shew what the goods were; but the court held it well enough here in action on the bond, where damages are not to be recovered, but the penalty of the bond upon any breach, though otherwise in covenant, where the recompence is to be for damages; and judgment for the plaintiff. Lev. 94 Hill. 14 & 15 Car. 2. B. R. French v. Pierce.

But if the condition had been to pay the moiety of such money as he should receive without saying (from time to time) it ought to be pleaded specially. Ibid.

43. Debt upon bond condition'd, that the obligor shall pay from time to time the moiety of all such money as he shall receive, and give account. The defendant pleaded, that he had paid a moiety. Plaintiff demurr'd. The court held this a good plea without shewing the particular sums, and this for avoiding stuffing the Rolls with multiplicity, and plaintiff cannot take any advantage but by replying, that the defendant had received such a sum, whereof he had not paid the moiety. Sid. 334. pl. 18. Pasch. 19 Car. 2. B. R. Church v. Brownwick.

Sid. 340. pl. 4. Heyman v. Gerard, S. C. adj'd accordingly.

—Saund. 102. Hayman v. Gerard, S. C. the court feriatim delivered their opinions, that the replication was

ill for not shewing a breach, and were ready to give judgment for the defendant, but at the instance of the plaintiff's counsel, the matter was refer'd to the 2 counsel, who determined it by their award, and so no judgment was enter'd.—S. C. cited and denied per Cur. and said, that they of their own knowledge were satisfied that it was not law, nor taken to be so at the bar when the judgment in that case was given. Carth. 116. Pasch. 2 W. & M. in B. R. in case of Meredith v. Allen, which see infra, pl. 51.

Debt on a bond, after oyer crav'd of the condition, it appeared to be per-

* [335]

44. Debt on bond condition'd to give an account of all such monies as should come to his hands, and to pay them to the plaintiff. The defendant pleaded, that no money came to his hands. The plaintiff replied, that 50 l. came to his hands. The court held the replication ill, because it did not set forth any breach that he refused to account; for the plea is of matter within the condition, and therefore it is not sufficient to answer it without assigning a breach; for perhaps he has paid it, and therefore plaintiff should have said, that 50 l. came to his hands, and that he had not accounted or paid it; and judgment per tot. Cur. ruled against the plaintiff. Lev. 226. Mich. 19 Car. 2. B. R. Hegman v. Gerard.

45. Debt upon an obligation to do divers particular things in the condition mentioned. The defendant pleads performavit omnia, &c. and upon demurrer held an ill plea; for the particulars being expressed in the condition, he ought to plead particularly to every one distinctly; but * where the condition is to perform all covenants in an indenture, there he may plead performavit omnia generally, if

so be they be all in the affirmative, without answering particularly to every particular. 1 Lev. 303. Mich. 22 Car. 2. B. R. Wimbleton v. Holdrip.

between the plaintiff and defendant. The defendant pleads quod performavit omnia & singula ex ejus parte, &c. and mentions none in particular, and held naught, for he ought to set them forth. 7 Show. 86. Hill. 31 & 32 Car. 2. B. R. Pawlet v. Savage.

46. Debt upon bond condition'd, that if a ship going such a voyage should return, the perils of the sea excepted, then the defendant should pay so much, but if she be lost, then to pay nothing. The defendant pleaded, that the ship proceeded in the voyage, but in her return was lost. Plaintiff demurr'd, because it was not said that she was lost per pericula maris, for it might be by his own negligence; but adjudged, that the plea being in the very words of the condition, it is good. 2 Lev. 7 Pasch. 23 Car. 2. B. R. Waton v. Waddington.

47. The condition of the bond was, that if the plaintiff shall seal to the defendant a good and sufficient conveyance, in the law, of his lands in Jamaica, with usual covenants, in such manner as by the defendant's counsel shall be advised, then if the defendant should thereupon pay unto the plaintiff such a sum of money, &c. the condition should be void. In debt brought upon this bond, the defendant (after oyer of the condition) pleads, that Mr. Wade, a counsellor at law, did advise a deed of bargain and sale from the plaintiff to the defendant, with the usual covenants, of all his lands in Jamaica, and tendered the conveyance to the plaintiff, who refused to seal the same, and so would discharge himself of the condition, the money being not to be paid unless the assurance was made. The plaintiff demurr'd, 1st, Because the defendant has not shewed the conveyance, and an affirmative plea ought to be particular, and not so general as this. 2dly, The matter of the condition consists both of law and fact, and both ought to be set out; the preparing of the deed is matter of fact, and the reasonableness and validity thereof is matter of law, and therefore they ought to be set forth that the court may judge thereof. 3dly, The plea is, that the indenture had the usual covenants, but does not set them forth, and for that cause it is also too general. The whole court were of opinion, that this plea was good; for if the defendant had set forth the whole deed verbatim, yet because the lands are in Jamaica, and the covenants are intended such as are usual there, the court cannot judge of them, but they must be tried by the jury. He has set forth, that the conveyance was by a deed of bargain and sale, which is well enough, and so it had been if by grant, because the lands lying in Jamaica pass by grant, and no livery and seisin is necessary; if any covenants were unreasonable and not usual, they are to be shewed on the other side; and so judgment was given for the defendant. 2 Mod. 239, 240. Trin. 29 Car. 2. C. B. Goffe v. Elkin.

48. Debt upon bond for payment of 120 l. on the 4th of January, according to agreement in writing. The defendant pleaded the agreement, which recited a controversy concerning the probate of a nuncupative will of A. E. and that the plaintiff was her next of kin, and

had entered a caveat, and in consideration that he would withdraw it, so as the defendant might prove it, and be sworn executor as he was, he covenanted to pay the plaintiff 120 l. on the said day, out of the personal estate of the said A. E. which should come to his hands, in full satisfaction of all demands out of the same, according to the intent of the said bond, and that after the said bond hucusq; no part of the personal estate of the said A. E. came to his hands to the value of 120 l. and that he had never any of the said personal estate but to the value of 50 l. Upon demurrer the plea was adjudg'd ill, for having confessed that he had 50 l. he ought to have paid that, the meaning of this condition being, that he should pay 120 l. or so much thereof as he should receive before the 4th of January out of the personal estate, and that if he received none before that day, then none should be paid; therefore, because he neither pleaded a payment, or a tender of the 50 l. on the day, the plaintiff had judgment. 2 Jones 218. Pasch. 34 Car. 2. B. R. Ogle v. Quintin.

[336] *Comb. 107. S. C. adjudg'd for the plaintiff.* 49. In debt on bond for performance of covenants, whereby a stranger is to render an account, the defendant pleaded performance generally. The plea is ill. Show. 1. Pasch. 1 W. & M. Fitzpatrick v. Robinson.

50. Debt upon two bonds, the condition of the one was, that a marriage being intended between the defendant and one A. S. he should permit her to dispose of her personal estate, and that the persons to whom she should dispose should enjoy it; and the condition of the other was, to permit her to give away 50 l. and that the defendant should pay it within two months after her death. The defendant pleaded to each, *quod conditio ejusdem scripti nunquam infracta fuit per ipsum ad aliquod tempus hucusq; & hoc paratus est verificare.* Upon demurrer it was argued that this plea was good, and should force the plaintiff to assign a breach; for the matter lay not within the defendant's notice, whether she had made any disposal or not, and so could plead no otherwise than thus; but the court held the plea ill, and that the defendant must *shew how he had performed* the conditions, and that this manner of pleading was never admitted. 2 Vent. 156. Pasch. 2 W. & M. in C. B. Brown v. Rands.

51. Debt upon a bottomree bond, the defendant *craw'd over* of the condition, and pleaded that the ship was lost. The plaintiff replied, that the ship was not lost, and concluded to the country. The defendant demurr'd, for that the plaintiff had not assigned any breach in the replication, and the condition was for payment of money, and now upon over the condition was become part of the declaration, and then upon the plaintiff's declaration there is no cause of action without breach of the condition in the replication, and cited the case of Hayman v. Gerald, which Dolben said was disapproved at the time, and not law, and that Saunders answers it in his report of it; and Holt Ch. J. said, that the true difference is, *where the matter pleaded admits and supposes a non-performance, there is no need to allege a breach*; and so judgment was given for the plaintiff. Show. 148, 149. Pasch. 2 W. & M. Meredith v. Allen.

1 Salk. 138. pl. 2. S. C. adjudg'd for the plaintiff. And per Holt Ch. J. in all cases (that of a bond to perform an award excepted) if the defendant pleads a special matter that admits and excuses a non-per-

formance, the plaintiff need only answer and falsify the special matter alleged, for he that excuses a non-performance supposes it, and the plaintiff need not shew that which the defendant had supposed and

and admitted; but if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach, for then he has not a cause of action unless he shew one. The reason of that case of the award is single; it is because though an award be made, yet it may be void in whole or in part, and therefore the plaintiff must not only shew the award, that the court may see that there was an award, but must also set forth the breach that it may appear, likewise that the non-performance was of a good part of the award, and not of a void part thereof, for in that it need not be performed, and cited 2 Cro. 472. But if the defendant pleads non submisit, and so forces the plaintiff to issue, there need be no breach set out, and cites Sid. 290. — Carth. 115, 116. S. C. accordingly, and the reporter adds a note, that the plea in this case was ill; but per Curiam, if it had been good, the replication likewise had been good without assignment of any breach; quod nota.

52. The assignment of the breach of a condition, &c. in the replication is not necessary, but only in that single case of debt on a bond for performance of an award. Carth. 116. Pasch. 2 W. & M. in B. R. in case of Meredith v. Allen.

53. In debt upon bond, &c. the defendant pleaded a letter of licence from the plaintiff's testator and all his creditors, provided, that within two months he would assign and secure all the profits of the tithes of the rectory of S. to the use of his creditors, as counsel should advise, and averr'd, that W. B. his counsel, did advise a letter of attorney to be delivered to one J. S. to demand and receive of one H. tenant of the tithes of the said rectory, all rents and sums of money for the tithes, till the creditors should be satisfied, &c. But because it was not pleaded that H. had any, and what title, to all the tithes, &c. judgment was given for the plaintiff for this reason. Lutw. 675. 679. Hill. 12 W. 3. Plummer v. Adams.

54. Debt upon bond condition'd, that if such a ship should safely arrive at M. such a day, and well and sufficiently mann'd, victual'd, tackl'd, and provided for a voyage from thence to V. then, &c. The defendant pleaded, that the ship was safe in M. &c. and that she was well mann'd, victual'd, and tackl'd, but by force of wind was wholly disabled to compleat the said voyage, and did not say provided, as mention'd in the condition. The court said, that it might be true that the ship was disabled by force of the wind, but this might be because the ship was not well provided for, and thereby was unable to resist the wind, and therefore the plaintiff had judgment, by the opinion of the whole court. Lutw. 698. Trin. 12 W. 3. Dotin v. Downish.

55. If one be bound to pay money to J. S. at a certain time and place, it is not enough for the defendant to say, that the obligee came not, without saying, that he was there ready; per Holt Ch. J. 1 Salk. 172. pl. 5. Mich. 1 Ann. B. R. in case of Canterbury (archbishop) v. Willis.

56. The difference when the plea is to be in the words of the condition, and when not, is this; if there be any matter in law, &c. to be done that is under the jurisdiction, and for the judgment of the court, there you must particularly shew the performance, and the pleading in the words of the condition is not good. Arg. Holt's Rep. 207. pl. 12. Hill. 5 Ann. in case of Annesly v. Cutter.

57. As if I am bound to make you a sufficient release, there it is no good plea for you to say, you made a sufficient release, but you must shew it in particular that the court may judge of the validity thereof. Arg. Holt's Rep. 207. in S. C.

58. So is the reason of Specott's case, 5 Co. 57. *Schismaticus inveteratus* was not sufficient being too general, ergo uncertain for the court to judge; but where the condition is *to do facts merely*, the record is not to be swelled up therewith, and if there be occasion you may assign a breach, and cites 3 Bulst. 31. and cites 1 Roll. Rep. 173. Arg. Holt's Rep. 207. in case of *Annesly v. Cutter*.

59. So if the condition be a *thing* which is out of the jurisdiction of the court, or is to undergo an aliud examen, there pleading in the words of the condition is good. Arg. Holt's Rep. 207. in S. C.

60. If a condition be *to save one harmless from all actions pending*, you may plead there are *no actions pending* being general; per Holt Ch. J. Holt's Rep. 203. pl. 10. Mich. 5 Annæ in case of *Hackett v. Tilly*.

61. But if the condition be *to save you from a certain action pending*, there you are *stopped* to say, that such an action is not pending, being particular; per Holt Ch. J. Holt's Rep. 203. in S. C.

11 Mod.
145. S. C.
but there
the bond
was likewise
to render an
account; de-
fendant
pleaded that

62. In debt on bond *to exhibit an inventory* into the Ecclesiastical Court *before such a day*, it is not enough to plead that no court was held, but must plead also that he was there ready, &c. For he must shew that he has done all that could be done on his side towards a performance. 1 Salk. 172. pl. 5. Mich. 6 Annæ, B. R. *Canterbury (archbishop) v. Willis*.

he had exhibited an inventory, but that he was never cited to account. The court was clear, that the bar was naught, and that he was bound to account before the last day in the condition, without citation, at his peril.

[338] 63. Where the condition refers to a multitude of particulars which may never be brought to issue by the parties, there it is sufficient for the defendant to plead in general, and it lies on the plaintiff, by way of replication, to assign a breach; because for the defendant in his plea to descend to that variety of particulars, would overcharge the record to no purpose, and would tend to intangle the defendant who would fail if he mistook in pleading any of them; whereas the plaintiff, by chusing out of that variety that singular matter by which the condition is broken, brings it to one proper single issue; and therefore in this case the modern lawyers have relaxed the ancient rules of pleading, which required the bar to be sufficient and substantive, and in such cases have only required the defendant to follow the generality of the words of the condition, without descending to particulars. Gilb. Equ. Rep. 252. in case of *Fitzpatrick v. Strong*.

64. In debt upon a bond, the defendant craves over of the condition which was, that if we the above bounden J. S. and P. S. or either of us, any or either of our heirs, executors or administrators, do well and truly pay to the above named L. F. his executors, administrators and assigns, all sum or sums of money which shall appear to be due upon a fair account stated on account of rent, or arrears of rent, due the first day of May last, at or before the first day of November.

November next ensuing the date hereof, *then the above obligation to be void.* The defendants plead, that on the first day of November then next ensuing the date of the obligation, viz. 4^{to} die Nov. 1709, at Dublin, in the parish of St. Michael, in the ward of St. Michael, *they paid to the defendant all such sum and sums of money which then appeared to be due on a just account stated, on the account of rent, or arrears of rent, due the first day of May in the year aforesaid.* To this the plaintiff demurs, and shews for special cause, that the defendants had *not shewn any particular or certain sum of money that they had paid* to the plaintiff, nor what was the value of the rent, or arrears of rent due the first of May. The defendants join in demurrer, & *judicium pro quer.* for there is no proper issue for the jury to try; and therefore saying, that at such a time and such a place he paid all sums, is shewing nothing in certain on which the plaintiff can descend to issue; and therefore the obligation stands confessed, since the defendant does not shew to the court that it is properly avoided by the alleging the payment of any other sum, than by the condition is to be paid in discharge of the obligation, and consequently the plaintiff's declaration stands good, and judgment for the plaintiff. Gilb. Equ. Rep. cases in the Exchequer in Ireland, 251. to 254, 255. Fitzpatrick v. Strong & al'.

(Z. d) Condition. Qualified. And relieved in Equity.

1. **T**HE plaintiff leased to the defendant rendring 3l. a year rent, and to re-enter on default of payment in twenty days. *Bond by lessor that lessee shall quietly enjoy, and for performance of covenants. Lessee fails in payment of his rent. Lessor enters for non-payment.* Lessee sues the bond and gets judgment and recovers 21 l. at law. But this court ordered repayment. Chan. Rep. 95. [339]

12 Car. 1. Pope v. Day.

2. Lands were devised to the heir at law after the death of the devisor's wife, but subject to *pay debts and legacies* within two months after the wife's decease. The heir at law dies, and his heir at law (during the life of the wife) sells the reversion. The wife dies. The purchaser pays debts and legacies, but *does not pay all.* The heir at law enters for the forfeiture; but the purchaser was relieved against it. Chan. Rep. 161. 1649. Underwood v. Swain.

3. Covenant in a lease was, that *if lessee should, without licence, lease for more than three years, unless to his wife or children,* the lease should be void. The executor aliened it without licence, but the alienee was relieved, it being *sold for payment of debts.* Chan. Rep. 170. 1656. Cox v. Brown.

4. In case of a *bond for performance of covenants* the obligee shall have no more than he is really damnified, and shall recover in a trial at law. Chan. Rep. 199. 12 Car. 2. in case of Davenport v. Longville.

5. A set-

5. A settlement was with *proviso*, that the heir at law should not attempt to impeach it. There were several doubts and ambiguities in it. The court directed a trial at law, and that the trial should be no forfeiture. 2 Chan. Rep. 75. 14 Car. 2. *Sterling v. Levingsstone*.

6. When a man takes a security by a penalty he sets up his rest there, and makes himself judge of what he would have, and he ought to have no more. Arg. Chan. Cases. 24. Trin. 15 Car. 2. in case of *Crisp v. Blake*.

7. Mortgagee by will remits part of the mortgage-money and all the interest, if the arrears are paid in three years. The mortgagee, failing to pay within the time, loses the benefit of the request; admitted by *Serjeant Fountaine*. Chan. Cases. 52. Pasch. 16 Car. 2. in case of *Glover v. Portington*.

Nelf. Chan. Rep. 96. S. C. & S. P. held accordingly. — S. P. insisted upon Arg. Chan. cases,

110 Trin. 20 Car. 2. — So of an award not performed within the time limited, it was set aside. *Finch's Rep.* 22. Mich. 25 Car. 2. *Ewes and Reeve v. Blackwall*.

8. Money payable according to the condition of a bond was moderated, in regard that the office out of which it was to issue was taken away for some part of the time; and decreed the obligor to pay for so many years only as the office continued, and thereupon the bond to be delivered up. Chan. Cases. 72. Hill. 17 & 18 Car. 2. *Lawrence v. Brasier*.

9. A less sum, due by specialty, was agreed to be accepted instead of a greater sum due, if paid at such a day certain. The question was, if the debtor fails of payment at the day, whether he shall lose the benefit of such agreement or not. It was order'd to be made a case; and the reporter says it is to be observed that part of the consideration of the agreement was, that one who was not bound by any former security had paid the creditor 70l. and undertook to pay him 40l. more, and so the security was better'd. Chan. Cases. 110, 111. Trin. 20 Car. 2. *Delamere v. Smith*.

See Tit. Marriage (K) pl. 4. Farmer v. Compton.

10. If condition be to have consent in writing, and the consent is had without writing, this court will help in that case. Arg. Chan. Cases. 141. Mich. 21 Car. 2. in the case of *Fry v. Porter*.

11. Condition of a recognizance was qualified in equity according to the equity of the matter before the recognizance was given. Chan. Cases. 191. Mich. 22 Car. 2. *Holt v. Holt*.

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12. As where H. a citizen of London, seised and possessed of several houses in London and elsewhere, of a publick title, devised 10,000 l. to his daughters, being his only children and orphans, to be paid out of his real and personal estate before any other should have benefit of his lands, &c. and made A. his nephew and others his executors, and died in 1658. A. and others, as his sureties, entred into a recognizance to the chamberlain of London for payment thereof. By the restoration the houses being of a publick title reverted to the right owners, and by the fire in London the other houses were burnt down, so that it was to be doubted the whole estate would not amount to the 10,000 l. and because if the chamber of London had taken the estate into their own hands, it would have been in no better plight than now it is, and the intention of the security was only that

that the executors should not misemploy nor waste the estate, which they had not done, lord keeper, assisted by 4 judges, decreed that the recognizance should be made use of no further than to make good the value of the testator's estate over and above the said losses. Chan. Cases. 196. Mich. 22 Car. 2. Holt v. Holt.

13. A. grants an office to B. for 6 months, and M. and N. by bond, reciting the said grant, are obliged for his faithful performance during all the time; this extends no further than to the 6 months recited in the condition. 2 Saund. 411, 414. Pasch. 24 Car. 2. Lord Arlington v. Meyrick.

14. Vendor of lands takes a lease of them at such a rent, with condition of re-entry, and gives collateral security for the payment of the rent. The rent is arrear. Vendee re-enters. Vendor can have no relief against the collateral security without payment of the arrears of the rent due before the re-entry as well as after the re-entry. The lands sold were affirmed to be 250 l. per Ann. but were worth but 160 l. Chan. Cases. 261. Trin. 27 Car. 2. Anon.

15. 500 l. was devised to the plaintiff's wife, if she married with the consent of certain trustees, and in case she did not, then 20 l. per ann. for her life; she married the plaintiff without the consent of the trustees, and he preferred his bill here for the 500 l. and it was argued on the behalf of the defendant, that this did differ from the common case of a devise upon condition in terrorem; for it has always been held that where there is a devise over to a 3d person for non-performance of the condition, there if the party marry without consent, &c. all shall go to the 3d person, because he hath a conditional interest by the will, and if there be no devise over, then it is esteemed only in terrorem, and the party shall have the legacy notwithstanding the breach of the condition; but here this is tantamount, or as strong as a devise over, when the party himself saith, that if she marieth without consent, she shall have but 20 l. per ann. But to that it was answered by the lord chancellor, that this differed not from the reason of the common case of a devise in terrorem, and the reason he said he had from my Ld. Ch. J. Hale, who (when it was objected in another case in this court, that this court will not make men's wills for them, and give their estates quite contrary to their intents) answered, that this court holds plea of legacies, and judges of them by the rules of the civil law, and by that law any condition added to restrain marriage is void; so that where an interest doth not accrue to a 3d person by the breach of the condition, such a condition is void, and only in terrorem, and so the 500 l. was decreed to the plaintiff. But if it had appeared that any surprise or bribes, &c. had been used in obtaining a young maid to marry unsuitably, perhaps this court would order it otherwise. 2 Freem. Rep. 41, 42. pl. 45. Mich. 1678. Hicks v. Pardavis.

16. Bond to pay the final condemnation of the court of Dover if judgment be in that court against the obligor, and he appeals properly, and the sentence be repealed, the obligor shall be eased of the bond. Chan. Cases. 306. Hill. 29 & 30 Car. 2. Stock v. Denew.

17. A feme

2 Lev. 176.
S. C. is a
D. P. —
And so is
Freem. Rep.
442. pl. 598.
Ibid. It is
said there
in a note
that it is
admitted at
law and in
equity.

17. A feme covert, having power by will to devise lands, devises them to her executors to pay 500*l.* out of them to her son, provided, that if the son's father gives not a sufficient release of goods in such a house to her executors, that then the devise of the 500*l.* should be void, and go to the executors. After her death a release was tendered to the father, and he refused; but on a bill brought by the son against the executors and the father, the father answered that he was now ready to release, tho' for some reasons he had before refused; whereupon the lord chancellor decreed the payment of the 500*l.* and said it was the standing rule of the court, that a forfeiture should not bind where a thing may be done after, or a compensation made for it; as where the condition is to pay money, &c. and though it is generally binding where there is a devise over, yet in this case, the will saying that it shall go to the executors, it is no more than what the law implied. 2 Vent. 352. Pasch. 33 Car. 2. in chancery. *Cage v. Ruffel*.

18. Where there is an agreement to do a thing upon a penalty, the penalty can never be demanded in equity, if the party performs that for the not doing whereof the security or penalty is given. Arg. 2. Chan. Cases 88. Pasch. 34 Car. 2. in case of *Hele v. Hele*.

The reporter adds a quære, if he would at all relieve against the forfeiture, if A. had not made such offer by his answer, so as he might be paid the 200*l.* Ibid.

19. M. possessed of a lease for years assigns it to D. on condition not to alien without licence. M. without licence mortgaged the lease, and then becomes a bankrupt. Assignee of the commissioners prays relief against the forfeiture; M. by answer waves the advantage, if the 200*l.* which was the consideration of his assignment, may be repaid him. It was insisted that M. had taken bond of D. and also that M. had actually come in as a creditor before the commissioners, and paid his contribution money. But lord chancellor would not relieve against the forfeiture without payment of the 200*l.* 2 Chan. Cases 127. Mich. 34 Car. 2. *Davis v. Moreton*.

20. The baron of lessee, after his wife's death, assigned two leases, in consideration whereof the assignee gave bond of 300*l.* to pay the baron 20*l.* per ann. for life, and all the rent to the lessor; the assignee brought a bill to be relieved against this bond, for that the leases were forfeited for non-payment of the rent. But having had the full benefit of the leases, notwithstanding the forfeiture, he afterwards re-entring on payment of the arrears, the court decreed the plaintiff to pay the defendant, the lessee, all the arrears of the 20*l.* a year, and to continue the payment thereof as it grows due; but it being suggested in the bill that the wife, before her marriage with the defendant, had assigned the leases to trustees for the use of her children by her former husband, it was order'd that the defendant should first give security to be approved by the master to indemnify the plaintiff against the said children. Fin. Rep. 49. Hill. 25 Car. 2. *Powell v. Morgan*.

21. A. devised to C. his younger son, lands called S. *Proviso if C. be binder'd enjoying those lands, he shall have his lands in B.* C.

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is evicted of a moiety by a stranger, without the privity of the heir at law. The lands in B. are of much greater value than those called S. Per North K. this is a condition that lies in *compensation*, and decreed C. to have only a satisfaction pro tanto out of B. and decreed accordingly. Vern. Rep. 270. pl. 265. Mich. 1684. Tyle v. Tyle.

22. An *insurance* was made to farmers of the duty on sea-coal, to pay money if the duty should determine before such a time. The duty in strictness might perhaps be said to determine, yet the duty being enjoy'd by the insured, or they having made some composition touching the same, and so *not damnified*, their plea that the duty determined before the time agreed on was over-ruled, and they ordered to answer. 2 Vern. Rep. 10. pl. 6. Mich. 1686. [342] Knightley, alias Robinson v. Burdett.

32. A. the father makes a *voluntary settlement upon B. his eldest son in tail male*, remainder to C. a second son, &c. in which is a *proviso*, that if B. did not pay to C. 600l. at his age of 21, then the estate of B. both in law and equity, should cease. A. having afterwards married a 2d wife, by deed taking notice of the former settlement, and that B. had not paid the money according to the proviso, conveys the same lands to the use of his children by his last wife. The plaintiff's bill was, to be relieved against the forfeiture for non-payment at the precise day; but in regard the conveyance was purely voluntary, and the father might have put what conditions or restrictions upon his son he thought fit, and the proviso being special, that for non-payment at the day the son's estate both in law and equity should cease, the court refused to relieve the plaintiff, and dismissed the bill; and the rather for that the plaintiff had set up a release against his father, which was obtained by surprise; and the deed in law was defective, and amounted only to a declaration of trust. Vern. 456, 457. pl. 431. Pasch. 1687. Longdale v. Longdale.

33. A legacy was given on condition, that *legatee shan't dispute or interrupt her will*; the legatee contests the validity of the will. Fin. R. p. 49 Powell v. Morgan is not S. C. Per Cur. There was *probabilis causa litigandi* and 'twas not a forfeiture of the legacy. Per master of the rolls. 2 Vern. 91. pl. 86. Mich. 1688. Powell v. Morgan.

34. A. having 5 daughters and seifs'd of land in fee of 10,000l. value, settles it so that in case his eldest daughter should *within 6 months after his decease pay 6000l. among his other 4 daughters, then the eldest to have the land*; no payment was made in the 6 months, but within that time application was made by her to the trustees to join in a mortgage or sale to raise the money, but that not taking effect she brought her bill and assigned her interest to the plaintiff. In case of default by the eldest daughter the land was *devise'd over on the like condition*. Per commissioners; this being a power coupled with an interest is relievable, and the court may enlarge the time, and hath usually done it even in case of a *condition precedent*. 2 Vern. 166. pl. 153. Trin. 1690. and *ibid.* 222. pl. 202. Pasch. 1691. Woodman v. Blake.

35. When

A. devised to his son, paying his daughter 500 l. and in default thereof to

the said daughter, and her heirs. The son devised it to his mother for life, and afterwards to an infant and his heirs. The mother and daughter combine together, and the mother refused to pay the 500 l. by which means the estate would be forfeited to the daughter, and the infant defeated. Decreed that the mother pay one third part of the 500 l. and that if she refuse, then the infant paying the whole, shall have it to him and his heirs against them both. But if the mother pays one third, then she to enjoy for her life. Fin. Rep. 231. Trin. 27 Car. 2. Hayes v. Hayes.

35. When the person, that is to receive benefit, by practice, or contrivance prevents the performance of a condition, equity will relieve. Admitted per lord Somers. 2 Vern. R. 344. Hill. 1697. in case of *Carie v. Bertie*.

36. *A. devised land to J. S. paying to A's daughter (who is heir at law to A.) 1000 l. J. S. makes default. The daughter recovers in ejectment. The heir of J. S. had relief on payment of principal and interest, though in favour of a voluntary devise, and to the disherison of the heir. 2 Vern. 366. pl. 328. Mich. 1699. Barnardiston v. Fane.*

[343] 37. 400 l. was left in a purchaser's hands for 2 years without interest, and if the wife of A. the vendor released dower in that time, then B. the vendee was to pay the 400 l. else to retain it absolutely. A. died, his widow did not release within the 2 years, but brought her writ of dower though she died before the recovery of it. But 'twas insisted that this was not in the nature of a penalty, but the terms of an agreement, and the measure of the satisfaction for the contingent incumbrance of dower, and the court would not have relieved had she released after 2 years, and decreed accordingly by lord Sommers. Ch. Prec. 102. Mich. 1699. Small v. lord Fitzwilliams.

²Vern. 594. pl. 533. S. C. —

* Where the party might be put in as good a plight as if the condition itself had been literally performed

chancery will relieve, though the letter was not strictly performed as payment of money, &c. But where the condition was collateral and no recompence or value could be put on the breach of it, there no relief could be had for the breach of it. Arg. by Sir Robert Raymond ac-counsel. Ch. Prec. 487. said 'twas laid down as a rule per lord Somers and cites 3 Ch. cases [135] *Bertie v. Falkland*. — S. P. and C. 12 Mod. 184 per lord Somers.

38. Lands were devised to J. S. paying the heir 20,000 l. within 20 years, at 1000 l. per ann. The heir entered for non-payment as for a forfeiture, and though it was urged that chancery ought not to aid in disherison of an heir, yet lord C. Cowper chancellor said, that the entry of the heir in this case was only to enforce the payment of the money. As where a mortgagee enters the court can give him interest from the time it became payable, and * where ever the court can give satisfaction or compensation for a breach of condition they can relieve. 1 Salk. 156. pl. 7. in chancery 1707. *Grimston v. lord Bruce and Ux'*.

39. Bill to be relieved against the condition of a *bottomree bond*, &c. it being not performed in some small circumstances, but denied per Cowper C. it being a voluntary undertaking of the obligor, and no contract or consideration that might incline the court to interpose. Mich. 3 Geo. Canc. Anon.

40. Lease for life or years on condition of re-entry for a forfeiture, or that the lease should be void if lessee aliens or assigns without licence. In case of forfeiture, chancery will not relieve because

'tis

It is unknown what shall be the measure of the damages, for that is only where there can be a compensation in damages. 9 Mod. 112: Mich. 11 Geo. Wafer v. Macato.

41. J. S. charged his real estate with 500 l. to be paid his sister Alice Herne, within one month after her marriage, but so nevertheless as she married with the approbation of his brother Joseph Herne (if living) and in case she married without his consent, the 500 l. was not to be raised. Alice Herne married in the life-time of Joseph Herne, and without his consent, and the question was, whether she was entitled to the 500 l. or not; for here it was said that this was a condition only *in terrorem*, and that the construction of such conditions has always been, that where there is no devise over such condition is void, otherwise were limited over, and here it is not.

E contra it was argued that this is a condition precedent, and nothing arises or becomes due but upon the marrying with consent, and that this being a devise of money out of land, or of a charge upon the land, it is to be considered as a devise of land, &c. and governed by the same rules, and then being a plain condition precedent nothing does arise, &c. and for this was cited the cases of Fry v. Porter. Berlie and Faulkland, &c.

The master of the rolls said, that the civil law makes no distinction in *personal* legacies, between conditions precedent and subsequent, neither does this court as to meer personal legacies given upon condition of marrying, &c. with consent, &c. But *this court differs from the civil law in this, that whereas by that law all conditions in restraint of marriage are void, but this court says they are not void where the legacy is given over and another person particularly substituted by the testator to have the benefit of it in case the condition be not complied with, but this must be a special nomination as a legatee, and therefore a residuary legatee or executor should not have the benefit of such non-performance, and remembered a case to this purpose, that where a legacy given upon such condition of marrying with consent, and if not that it should sink into the residue of testator's estate which he gave to J. S. &c.* [344] It was held that though the marriage was without the consent, yet the legacy was not lost because it would have been the same if testator had said nothing about its sinking into the residuum, and therefore was construed only in *terrorem*. So it is in the case of a trust of a term limited of lands for raising portions with such restriction, this court governing itself by the same rules as in case of a devise of a legacy with such condition, because though the term be a legal estate and interest, yet the trust of the term is a creature of equity only, &c.

But it is otherwise in case of a devise of lands, there conditions precedent, and subsequent take place, &c. and this was Fry and Porter's case of an infant bound by condition, relating to her marriage being a condition precedent, and held that the present case being a charge upon land is to be governed by the same rule, and is to be considered as land, the will must be attested in the same manner, &c. and this being plainly a condition precedent, and nothing vested (as in case of a trust term where the term is vested and the trust only left open)

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open) it is too hard for this court to charge the land contrary to the express will of the testator, and to say the money should be raised when the testator has said it shall not, &c. and held that a charge on the land can't arise, &c. otherwise than as a devise of the land itself, wherefore the bill was dismissed as to this point; for Alice the legatee were cited *Salisbury v. Bennet*, 2 Vern. 1 Ch. Ca. 22. *Bulafis v. Ermin*, and *ibid.* 58. *Fleming v. Waldgrave*. But as to this it was said by Mr. Attorney General, and agreed by his honour, that the legacy there vested immediately, it being given upon her not marrying without consent, &c. and his honour remembered a like case in time of Wright S. C. where the condition being if she did not marry with consent, &c. and the legacy was decreed her immediately, and she to enter into a recognizance to refund in case she married without consent, &c. *Ms. Rep. Mich.* 4 Geo. 2. Chanc. *Reves v. Herne*.

[For more of Conditions in general, see Accord, Actions of Assumpsit, Apportionment, Arbitrement, Covenant, Devise, Entry, Grants, Heir, Mortgage, Notice, Obligation, Pleadings, Policy of Insurance, Rent, Reservation, Tender, Tout Temps Priſt, and other proper titles.]

Confession

Confession.

(A) What shall amount to it Actions of which Advantage shall be taken. And in what Cases, and how the Confession must be, or may be.

1. **I**N *wast*. Per Marten, if the defendant confesses *wast* in his protestation and pleads no *waste* done, the plaintiff shall have advantage of the confession contained in the protestation quod non negatur. By which he pleaded no *wast* done, and ousted the protestation out of the plea. Br. Confession, pl. 60. cites 11 H. 6. 1.

2. In *detinue* of a chest of charters and of a charter special, if the plaintiff will confess the action, he ought to confess it as the plaintiff has counted. Br. Confession, pl. 56. cites 11 H. 6. 29. and Fitzh. Detinue, 11. [345]

3. If issue is join'd, and after the defendant or tenant pleads release of the plaintiff after the last continuance, and he says that not his deed after the last continuance, or that he made it before and not after, this by some is a confession of the deed. Br. Confession, pl. 42. cites 21 H. 6. 9. Br. Traverse per &c. pl. 166. cites S. C. In trespass, the defendant pleaded not guilty

and so to issue, and day given till another term, and mesne between these the plaintiff released to the defendant, &c. and at the day other continuance was taken, at which day the defendant said that the plaintiff by the deed bearing date before the last continuance, and primo deliberat' to him after the last continuance released to him, &c. and the plaintiff said that the delivery was when it bore date absque hoc that it was delivered after the last continuance, and per tot Cur. the plaintiff shall be barr'd by confession of the release after the action brought and after the trespass done, but per Cur. the plaintiff might have said that he did not deliver the deed after the last continuance without saying more. Br. Negativa, &c. pl. 43. cites 16 E. 4. 5.

4. The defendant justified that the beasts escaped into the land of the plaintiff and spoiled his grass, and he freshly re-took, and no plea, but is a confession of the trespass, by which he prescribed in the escape. Br. Treipafs, pl. 155. cites 22 H. 6. 36.

5. In debt the defendant pleaded release, and at the day of Ven. fac. made default, the plaintiff prayed judgment upon the obligation, and by the opinion of the court he shall have it; for this is a confession of the obligation as he had pleaded acquittance. Br. Judgment, pl. 79. cites 5 E. 4. 7.

6. In trespass the defendant justified the taking by licence of the plaintiff to detain in pledge for 1 l. which the plaintiff owed him, and the defendant demurred; by this the debt is confessed. Br. Confession, pl. 65. cites 5 H. 7. 1.

7. *Contra* it seems, if he had taken the debts by protestation and demurred upon the bar. Ibid.

Br. Ekoppel, 8. In *formedon*, per omnes except Husley, if the tenant pleads
pl. 151. cites warranty with assets, which is found for the demandant upon traverse
5 H. 7. 23. of the assets, by this the demandant has confessed the warranty, and
S. P. [and shall not say not his deed after, for he cannot deny the assets with-
So are all the out confessing the warranty as it is said there in a nota; but Brooke
editions, but says it seems to him, that in this case the demandant may say *pro-*
it seems mis- *testando*, that the deed is not the deed of his ancestor, and *pro placito*
printed for 5 H. 7. 2. nothing by descent; and if this plea be found for him he shall plead
3. pl. 4.] non est factum after. Br. Confession, pl. 62. cites 5 H. 7. 2. 3.
Nota per Brian, if a man pleads
eius passa by the debt, he cannot give in evidence, that non est factum; because by the pleading the
deed is confessed; quod nota & querre. Br. General Issue, &c. pl. 79. cites 5 H. 7. 3.

9. *Not guilty* is no confession of the tenure; *contra* of pleading *riens arrear*. Br. Verdict, pl. 56. cites 9 H. 7. 3.

Brownl. 89. 10. Debt upon an obligation to perform an arbitrement, the de-
S. C. fendant pleads the plaintiff's release; issue is joined upon it, and
found with the plaintiff. He has judgment. Affirmed in error,
although the plaintiff did not alledge any part of the arbitrement
and a breach of it in the defendant. The law requires that when
it is pleaded, that no arbitrement was made, not where the arbitre-
ment and breach of it are confessed, as in this case is impliedly
done. Jenk. 280. pl. 4. cites Mich. 3 Jac. Jeffery v. Grey.

Brownl. 89. 11. So of a bond for performance of covenants, and the defendant
S. C. pleads a release, and issue is joined upon it; for the plaintiff is
forced by the defendants plea to answer to the release, and has no
occasion to shew any breach of covenant for the reason aforesaid.
Jenk. 280. pl. 4. cites Mich. 3 Jac. Jeffery v. Grey.

[346] 12. So in an *assise*, where the tenant pleads a release, the disseisin
is impliedly confessed. This is the reason that where not guilty is
pleaded in trespass, a release cannot be given in evidence; for such
evidence and the defendant's plea are contrary. A release implies
a confession of the trespass, and a discharge of it by the release. Jenk.
280. pl. 4.

13. There is a great difference between a direct confession of the
party by a *bene & verum*, &c. and a *nient dedire*, or a demurrer;
that is, between a direct confession of the party against himself, and
an admittance by implication, or a verdict finding it, or the like;
as in 2 H. 7. 16. if a man bring an action of trespass against A.
quod ipse simul cum B. & C. did the trespass, and does not sue them
all, his writ shall abate; and if he bring his action against A.
and he plead the trespass done by him, and B. and that the plaintiff
released to B. and the plaintiff traverses the release, yet his actions
shall not abate; So 9 H. 7. 3. if a man avow for two rents, and
the one of his own shewing appears not due, the whole avowry is
vicious; otherwise if it were so found by verdict; Per Hobart Ch.
J. Hob. 164. Mich. 10 Jac. in case of Colt and Glover v. Co-
ventry and Litchfield (Bishop of.)

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14. Proof upon the condition of an *obligation of an apprentice* by confession or otherwise, *touching the embezzling his master's goods*; Hob. 91. pl. 126. Gould v. Death, S. P. and a voluntary confession is good. *Jenk. 300. pl. 63.*

seems to be S. C.

15. *If in trover and conversion*, the defendant pleads a special plea he *must confess a conversion*; per Holt Ch. J. 2 Salk. 654. pl. 2. Mich. 10 W. 3. B. R. in case of *Hartford v. Jones*.

16. *Account against the defendants as bailiffs, &c. for 132 bushels of wheat* to the value of 20l. the defendant pleaded, that *plene computavit, de præd. 132 bushels*; the plaintiff replied, that *non computavit*, upon which they were at issue, and the plaintiff had a verdict and judgment that the defendant computed, and he appearing upon the capias ad computandum, there were auditors assigned, who afterwards delivered in the account, (*viz.*) that the defendant had confessed to them the receiving 120 bushels of light wheat ad merchandizandum; but that he, at the request of the plaintiff, had mingled ten bushels with it to make it fit for sale, and craved allowance of it, and of several other particulars in English; and upon demurrer the plaintiff had judgment to recover for the 132 bushels of wheat, for which he had declared, and not ad valorem; because by this plea of plene computavit, the defendant confessed he had received 132 bushels, but that he had fully accounted for so much, when before the auditors he had only accounted for 120 Bushels, which must be an imperfect account, and that is the same thing as if he had refused to account; and the reporter adds a note, that in such cases, if the judgment had been quod recuperet ad valorem, it had been wrong. *Lutw. 58. 63. Mich. 11 W. 3. Pierce v. Clarke.*

(B) By Attorney or Bailly, in what Cases.

1. **I**N *assise* the *bailiff* of the *tenant* cannot confess the *disseisin*.
Br. Confession, pl. 47. cites 22 Aff. 45.
 2. In *trespass* the *defendant* alledged, that the *plaintiff* was his *villein*, and because the *plaintiff's* attorney could not deny it, the court awarded that the *plaintiff* take nothing by his writ. The reporter says, that when this consuance of *villeinage* was received by attorney, all the justices* of the one bench and the other were present; quod mirum! ideo quære &c. Hill. 44 E. 3. fol. 2. b. pl. 9. Chateway v. the bishop of Winchester.
- Fitzh. At-
torney, pl.
45. cites
S. C.—
Br. Attor-
ney, pl. 29.
cites S. C.
accordingly,
but says,
quod mi-
rum!—Fitzh. Villeinage, pl. 40. cites Hill. 13 H. 4. S. P.—Kelw. 135. 2. b. pl. 118.
S. P. and cites S. C.—Jenk. 52. pl. 100. cites S. C. But says that the attorney has his warrant
ad perdendum & lucrandum; and though this resolution was in the presence of the judges of both
benches, yet it was not their resolution; for the power of an attorney relates to the matter in demand,
as appears by his warrant; but that if a *nativo habendo* be brought, such a confession may be receiv-
ed.—Jenk. 283. pl. 12. S. P. as to villeinage; for it is a final bar, as a *retraxit*, which requires
a personal acknowledgement.

* [347]

3. In *debt*, if a man is condemned, the *attorney* of the *plaintiff* cannot confess the *gree* [satisfaction] of his *master* after the year; for after the year his warrant is expired as to confessing *gree* [satisfaction,] and he ought to have a new warrant. Br. Satisfaction, pl. 39 H. 6. 49.

(C) The Force and Effect of a Confession, and where it is contrary to a Verdict.

1. **T**Respass done anno 17 The *defendant* pleaded a release of all actions anno the 16 and to any trespass after, not guilty; the *plaintiff* said, that the release was by *duress* and ill; for by this he confesses that it was done anno the 16 and so his action false, and so of his confession it shall abate. Br. Trespass, pl. 243. cites 22 Aff. 86.
- Br. Confes-
sion, pl. 48.
cites S. C.
accordingly,
but that it
would be
contra if it
had come
by verdict;
note the diversity.

2. In *assise* the *tenant* pleaded in bar, and confessed an ouster; the *plaintiff* made title, and found for him, and that he was neither seized or disseised, and yet the *plaintiff* recovered. The reason seems to be, in as much as the *defendant* has confessed an ouster, which proves that they were seized and disseised, when the title is found for them; For confession is stronger than verdict. Br. Confession, pl. 49. cites 44 Aff. 6.

3. In *debt* it was agreed, that if a man makes an obligation, and delivers it as a deed to a third person, to the intent that when the obligee has delivered to him an indenture, &c. then to deliver it to the obligee, and the obligee gets it before the indenture delivered, and so non est factum, and upon the issue thereof it is found that it is not his deed, yet the *plaintiff* shall recover, because he has confessed in pleading
- Br. Verdict,
pl. 3. cites
S. C.—Br.
Non est fac-
tum, pl. 4.
cite S. C.
—Jenk.
12. pl. 99.
cites S. C.

pleading that it is his deed ; for he has confessed delivery as a deed. Br. Confession, pl. 38. cites 9 H. 6. 37.

4. But *otherwise* it is as if he had said, that he had delivered it in, as an *escrole* upon condition as above, and after this performed to deliver it to the obligee as his deed ; note the diversity ; confession and verdict, and the one contrary to the other ; the confession shall bind, and the verdict shall be void. Ibid.

5. Where a man brings a joint action, and in pleading by replication or otherwise, after several bars pleaded, he confesses that his action is several, the writ shall abate ; quære, where such matter is found by verdict, there the plaintiff shall recover, and shall be amerced also ; and so see that confession is stronger than verdict. Br. Confession, pl. 22. cites 36 H. 6. 30. Br. Frief, pl. 245. cites 36 H. 6. 27. S. C.

6. Where it is confessed upon examination of the sheriff, that he has returned a man outlawed contrary to a *superfedeas*, and has returned the copies of the exigents, and not the writs themselves, there he shall be amerced, and there needs no indictment thereof against the sheriff to bring him to answer, and this by reason of his confession ; quod nota. Br. Confession, pl. 32. cites 5 E. 4. 5. per Markham and other justices. [348]

7. *Confessio facta in judicio omne probatione major est.* Jenk. 102. pl. 99.

8. At common law, where the defendant or tenant confessed the action, he might have a writ of error notwithstanding ; for the record consists of several things. Upon an indictment of felony, and a confession upon it, a writ of error lies if the error be apparent ; but the error ought to be allowed by the court before the writ of error be allowed. Jenk. 134. pl. 73.

(D) Judgment. In what Cases Judgment shall be given upon the Confession; and at what Time.

1. **I**N assise it was said for law, that if a thing be confessed in pleading, and the verdict found contrary, yet judgment shall be upon the confession, &c. Br. Confession, pl. 26. cites 28 Aff. 17.

2. But if a thing be confessed in pleading, and after the issue is taken in assise in point of the assise, or in another action the general issue is taken, so that the other matter is expelled from the pleading, or is not entered, there the confession is waived, and the verdict only shall take effect. *Ibid.*

3. In assise the tenant pleaded in bar and confessed an ouster; the plaintiff made title, which title was found, and that the plaintiff was not seized, yet the plaintiff recovered by reason of the confession of the ouster before, for he cannot be ousted if he was not seized; for the confession shall take effect though the contrary be found by verdict. Br. Confession, pl. 27. cites 28 Aff. 34.

Br. Re-
pleader, pl.
36. cites
S. C.

4. Where it is confessed by implication in pleading, that the defendant in trespass vi & armis is a lord, there, though the defendant pleads to issue, and the verdict passes for the plaintiff, he shall not recover, because it appears by the pleading that the action does not lie vi & armis against the lord. Br. Confession, pl. 34. cites 10 E. 4. 7.

5. In præcipe quod reddat against four, three confessed the action, and the fourth said, that he held jointly with the two, absque hoc that the third any thing had; judgment shall not be given upon the confession till the issue be tried; for this goes to the whole writ; quod nota. Br. Confession, pl. 1. cites 27 H. 8. 30.

Brownl. 196.
Glasbrook
v. Linsey,
S. C. says
the plaintiff
denied to
receive the
confession,
he having
taken out
his venire,
and that
those errors

6. In assault and battery the defendant pleaded not guilty, which was entered, and now he would confess the action, which the plaintiff was unwilling to accept, because the defendant had some influence over the sheriff before whom the inquiry of damages should be. The prothonotaries all said, they had never known a confession refused if offered before the nisi prius sealed; but however, the court in their discretion refused it, as well because the wounding was grievous as to avoid error. Hob. 220. pl. 292. Pasch. 16 Jac. Clafebrooke v. Livefay.

which had escaped in the proceedings by that confession, were not holden as they are after trial. The matter was much controverted by the court, and they were of several opinions, but because the plaintiff always prays for the confession, it seems he might refuse it; and afterwards it was adjudg'd that it should not be received, it appearing to the court to be only a practice to lessen the plaintiff's damages. —Noy 31. Livefay v. Glasbrook, S. C. ruled accordingly.

7. In debt for an escape of one in execution, the defendant pleaded nil debet, and after issue joined thereupon, the defendant offered to confess the action with relicta verificatione, and upon motion the court resolved that he cannot do it without the consent of the plaintiff, because many defects are aided by a verdict. 2 Jo. 156, Trin. 33 Car. 2. B. R. Cooling (the marshal's) case.

8. Trespass

8. *Trespass for taking his cattle in A. defendant justified a taking in B. by process with an impossible teste virtute cuius* he took them and traversed the taking in A. Upon this traverse issue was joined, and found for the plaintiff, and damages assessed. *It was objected, in arrest of judgment, that this issue was immaterial; for it is all one where the defendant took them since he took them without warrant, the process being void, quod fuit concessum.* It was moved then for a re-pleader, and per Holt Ch. J. *a re-pleader cannot be where there is a trespass confessed, and the verdict was set aside, and a writ of inquiry, because the issue being immaterial, the jury had no power to inquire of damages, and judgment was entered for the plaintiff on the confession, and not upon the verdict.* 1 Salk. 173. pl. 1. Trin. 8 W. 2. B. R. Jones v. Bodinham.

9. Judgment was confessed in *ejectment*, after not guilty pleaded. Ld. Raym. Rep. 345. Trin. 10 W. 3. Anon.

10. Where the defendant pleads an ill plea, but the matter, if well pleaded, might have amounted to a good bar or justification, judgment can never be given against the defendant, as by confession; but where the matter, though never so well pleaded, could signify nothing, judgment may in such case be given, as by confession; as if in case for calling him thief the defendant should justify, for that he received a thief. Per Holt Ch. J. 1 Salk. 173. pl. 2. Trin. 2 Ann. B. R. Staple v. Haydon.

11. 4 Ann. cap. 17. s. 2. *All the statute of jeofails shall be extended to judgment entred upon confession, nihil dicit, or non sum informatus, in any court of record; and no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon be stayed or reversed for any thing which would have been aided by the statutes of jeofails in case a verdict had been given in the action, so as there be an original writ or bill, and warrants of attorney duly filed.*

(E) Of one, in what Cases it shall bind another.
Successor, &c.

1. **I**N error, Shard said that he saw in the eyre of Northampton, that an abbot confessed a deed, and by this his successor was charged for ever. Br. Confession, pl. 29. cites 34 Aff. 7.

2. And per Wich. if an abbot or prior be brought into court by process of law in *præcipe quod reddat*, and he comes and confesses the action, this shall bind the successor, not by reason of the confession only, but because he, by this, is to execute the demand of the action, and the successor may have writ of right. Ibid.

If an abbot
confesses the
action in
writ of an-
nuity, his
successor
shall be
bound for
ever; quod

3. Contra of such confession in writ of annuity; for this goes to the person, and there does not lie writ of right, and therefore there the confession shall not bind the successor. But as to this point they were in doubt, and so as to this they adjourned. Br. Confession, pl. 29. cites 34 Aff. 7.

nota; and no falsifying shall serve; per Cur. Br. Confession, pl. 2. cites 9 H. 6. 2, 3.

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4. So it is of warranty confessed upon voucher, where an abbot comes by process, and if he there confesses the deed to be the deed of the warranty of the abbot or convent, which is not so, yet the succession is bound by this confession. Br. Confession, pl. 29. cites 34 Aff. 7.

5. But confession of the baron, or of the tenant in tail, shall not bind the same, or issue in tail; For per Finch. the issue is in a manner purchaser, and they were adjourn'd in doubt of the case of the annuity. Ibid.

Br. Error,
pl. 129. cites
S. C.

6. The confession of an abbot, who comes and confesses before the justices, without original pending, and without day in court, and process of the law shall not bind the successor; contra where he comes by process and confesses. Br. Confession, pl. 30. cites 37 Aff. 17.

7. Dower against three, the one disclaim'd in the tenancy, and another was ready to render dower, and the third made default and the render was not accepted because the one made default; for it may be that he may come and take the entire tenancy, by which grand cape was awarded against him who made default. Br. Confession, pl. 10. cites 2 H. 4. 14.

8. If debt be brought against two as executors, where the one is not executor, nor ever administred, and the executor makes default, and the other confesses the action, the executor has no remedy but action of deceit against him who confessed; for he is party to the judgment; per Littleton. Br. Confession, pl. 43. cites 9 E. 4. 13.

9. In replevin it was agreed, that if an abbot confesses action, the successor shall be bound, and shall not falsify. Br. Confession, pl. 53. cites 10 E. 4. 2.

10. If a *quare impedit* were brought against a common patron and his clerk, and the patron set forth his title to the advowson, and confessed no plenary of this presentation, and the clerk on the other side would.

would plead that he [was] inducted, &c. which were false, yet no doubt the patron should have a writ to the bishop; for the false plea of another shall not conclude him, the rather because the patron could not properly contradict his co-defendant's plea in that point. Per Cur. Hob. 193. pl. 245. in case of Winchcomb v. Pulestone.

(F) As to one, in what Cases it shall aid another.

1. **I**N waste, a man may confess waste against a stranger, and bar the plaintiff or confess disseisin to a stranger, and bar the plaintiff, and well: for the confession against a stranger is no matter to the plaintiff. Br. Confession, pl. 52. cites 5 E. 4. 7.

(G) By what Persons. Baron and Feme, &c.

1. **D**OWER by baron and feme, the tenant pleaded *ne unques seise que dower* &c. and the demandants confessed it, and were not suffered by reason that the feme was covert, by which they acknowledged by fine, and the feme was examined; quod nota. S. C. Quere upon confession; note the diversity. Br. Confession, pl. 5. cites 44 E. 3. 12.

2. Confession of baron and feme covert was taken of a deed without impeachment of waste. Br. Confession, pl. 59. cites 45 E. 3. 11. [351]

3. If the defendant prays aid, and the prayant [prayer] comes and offers to join, the defendant cannot waive the aid and plead alone; but he may confess the action in spite of the prayer. Br. Confession, pl. 57. cites 4 E. 4. 28, 29. per Danby.

4. If *præcipe quod reddat* be brought against baron and feme by the king, it shall be intended that they are seised in jure uxoris, and there, if the baron confesses the action, the feme has no remedy; per Catesby quod Markam J. concessit. Br. Confession, pl. 33. cites 7 E. 4. 17.

5. But where tenant for life is impleaded or makes default, and the baron is seised in jure uxoris, who has the reversion, there he shall not be permitted to confess the action; for receipt is to defend the right, and not to confess, &c. Ibid.

6. If an infant confesses the action, the confession shall not be accepted, because he is an infant. Br. Confession, pl. 36. cites 9 E. 4. 34. Per Moyle and Dandby. S. C. Br. Confession, pl. 55. cites 43 E. 3. 5.



(H) Punished

(H) Punished or favoured. How far.

Br. Fines
per Con-
cept, pl. 3.
cites S. C.
—Br. Im-
prisonment,
pl. 1. cites
S. C.

1. *Where a man denies his own deed which is found against him by verdict, he shall make fine and shall be imprisoned; so if he pleads a false deed or release, but if he confesses the matter before verdict, so that judgment is had upon his confession, in this case he shall only be amerced, and shall not make fine or be imprisoned; and so see that in some case a man's confession shall not be as strong against a man as a verdict, nota.* Br. Confession, pl. 3. cites 33 H. 6. 54.

2. *In trespass they were at issue, and now came the defendant and *relit* verifications per ipsum superius prout, and confessed the action, and upon this the plaintiff relinquished the damages, and that he would not further prosecute writ of inquiry of the damages, and it was prayed that he shall make fine, and did not.* Br. Confession, pl. 4. cites 34 H. 6. 43.

(I) Admitted or enforced, in what Cases or Actions.

3. *In attain, the tenant would have rendered the action, and the court would not receive it without taking the jury for the advantage of the king, and also land is not in demand by this writ.* Br. Confession, pl. 23. cites 6 Aff. 2.

2. *And it was said, that in Mortdancesor render has been accepted.* Herle said no, unless the tenant acknowledged the points of the writ. Ibid.

3. *In assise jointenancy was pleaded for part and bar for the rest, and the plaintiff, because he would not be delayed of the rest, confessed the jointenancy and prayed the assise of the rest, and had it quod nota, and the writ was not abated in all by the confession of the plea to part, quod nota.* Br. Confession, pl. 25. cites 19 Aff. 14.

4. *A man recovered damages against another, and after the plaintiff came and would have confessed his gree, and prayed to go quit.* Belk. said, you have no day in court, and therefore we cannot tell if you be the same person; and therefore the other, if he has release, may have scire facias upon it, or you may sue scire facias of the damages, and then you will have day in court, and so be aided by the day in court. Br. Confession, pl. 9. cites 50 E. 3. 18.

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Br. Journs,
pl. 22. cites
S. C.

5. *In appeal the defendant was convicted, and afterwards pleaded pardon of the king, and the plaintiff came in person and confessed that he would sue no further, by which the charter was allowed without day in court by process or otherwise given to the plaintiff to come and confess; quod mirum! that scire facias had not been awarded.* Br. Confession, pl. 12. cites 11 H. 4. 16.

6. *The defendant was outlawed and taken by cap. utlag. in account and pleaded misnomer, the plaintiff was not suffered to confess it by reason of the advantage which the king shall have by the outlawry,* Br. Confession, pl. 17. cites 21 H. 6. 21, 22.

7. In

7. In *præcipe quod reddat* against *baron and feme*, if the *baron* will confess the action it may be admitted, but if the *feme* will confess the action, her confession shall not be accepted. Br. Confession, pl. 21. cites 15 E. 4. 28. per Brian.

8. In *account* as receiver by the hands of the plaintiff himself, and of others. The defendant pleaded never his receiver, &c. and offered to make his law, and as to the residue he pleaded to the country, and at the day given he would have confessed the action for part and made his law for the residue. The question was, if he could do it without the plaintiff's assent, and the court doubted much, but at length all held, præter Harper, that the confession could not be allowed. D. 265. pl. 2. Mich. 9 & 10 Eliz. Anon.

9. When an action is brought for a thing certain as debt, &c. there the defendant may confess the action without the plaintiff's consent; but otherwise if it be for a thing uncertain, as trespass or battery; per Warburton J. Noy. 31. Pasch. 16 Jac. C. B. in case of *Livesly v. Glasbrook*.

10. If in an *ejectione firmæ* the plaintiff will not indemnify the tenant, the court will suffer him to confess the action, otherwise not. L. P. R. tit. Confession cites 12 Nov. 1650. B. S.

11. In *ejectment*, the demise by the lessor of the plaintiff to the plaintiff was laid to be the 27th of April 1697, which time was not come at the time of the trial; but the tenant had entered into the common rule to confess lease, entry and ouster. And the court compelled the defendant to confess the lease, entry and ouster; otherwise the plaintiff would have been nonsuit, and then he would have had judgment against the casual ejector; although it was objected, that the plaintiff could not have judgment, though the verdict were found for him; Ruled by the court of B. R. upon a trial at Bar. Ld. Raym. Rep. 728, 729. Mich. 8 Will. 3. B. R. Anon.

(K) Writ abated by Confession or Surmise. In what Cases and where in Part or in All.

1. **I**N *cui in vita*, the demandant acknowledged that the tenant entred into parcel by another, and not by him by whom his entry is supposed by the writ, and yet the writ was adjudged good for the rest. Thel. Dig. 219. lib. 16. cap. 4. f. 1. cites Mich. 19 E. 2. Brief. 841.

[353] 2. In *replevin de averiis suis captis*, if it appears to the court by the confession of the plaintiff that the defendant has taken only one ox, all the writ shall abate; per Herle. Thel. Dig. 219. lib. 16. cap. 4. S. 3. cites Pasch. 7 E. 3. 314.

3. In *assise of rent of 10l.* the defendant pleaded release of 3l. thereof, and the plaintiff confessed it, and yet the whole plaint was not abated, for it seems to be in bar of this part. Br. Confession, pl. 45. cites 8 Aff. 37.

And says that Parninge reports in this plea, that he had seen an assise abated because the plaintiff had confessed that one named in the writ had not disseised him. Ibid. And says see 11 Aff. 9. agreeing.

4. In writ against Jo. Curson and one J. S. Jo. made default, &c. J. S. took the entire tenancy and vouched this same Jo. Curson to warranty, and the demandant counter-pleaded it by the statute, &c. and was received thereto without abating his writ, inasmuch as he had not expressly acknowledged that Jo. Curson was not tenant the day of the writ purchased, notwithstanding that he had by his writ supposed Jo. to be tenant. Thel. Dig. 219. lib. 16. cap. 4. f. 4. cites Hill. 8 E. 3. 376.

5. In *trespass of trees cut and carried away vi & armis*, the defendant justified for estovers to take at his will, &c. To which the plaintiff said that the defendant had reasonable estovers to take there by view and livery of the bailiff &c. Upon which the defendant demanded judgment of the writ with vi et armis, inasmuch as the plaintiff has confessed that the defendant has right to take the trees &c. Sed non allocatur because they were not agreed upon the manner of the taking. Thel. Dig. 219. Lib. 16. cap. 4. f. 5. cites Mich. 8 E. 3. 422. and says, See 5 E. 3. 235.

Thel. Dig. 219. lib. 16. cap. 4. S. 6. cites S. C.

6. In *assise*, the disseisor pleads release of the plaintiff of all the right, and of all actions real and personal, and the plaintiff confesses it, the assise shall abate against all. Br. Confession, pl. 44. cites 11 Aff. 9.

7. So if he confesses that any named in the writ is not a disseisor, or that any of them was at another time acquitted. Ibid.

Fitzh. Brief, pl. 272. cites S. C. the court were of opinion, that if the demandant would confess that part of his

8. In *formedon* the tenant would have confessed parcel to be given, and the demandant would have confessed that parcel was not given; by which judgment was given, first that the demandant should recover the parcel confessed, &c. and afterwards he confessed that the other was not given, &c. for otherwise all the writ had abated. Thel. Dig. 221. lib. 16. cap. 4. f. 30. cites Pasch. 14 E. 3. Br. 272.

demand

demand was not given, all the writ should abate; but it being moved, that the parties were agreed, and consented that judgment might be given as above, it was adjudged accordingly.

9. But Pasch. 41 E. 3. 19. the demandant *confessed an exception taken to the writ for parcel*, and yet it stood for the rest. Thel. Dig. 221. lib. 16. cap. 4. f. 31.

10. In *assise*, the tenant as to parcel pleaded jointenancy, and the plaintiff confessed it, yet he had the assise of the rest. Thel. Dig. 219. lib. 16. cap. 4. f. 7. cites 14 Ass. 8. Pasch. 14 E. 3. Br. 273. and 19 Ass. 14. 21 Ass. 21. and 22 Ass. 6. and that so is the law in *scire facias*. Hill. 7 R. 2. Jointenancy 8.

In *assise*, the tenant pleaded jointenancy made by himself, pending the writ, and the plaintiff

confessed it and demurr'd, and yet the writ was abated, notwithstanding that it was pending the writ. Brooke says, it seems that it is not law. Br. Confession, pl. 46. cites 18 Ass. 6.

11. *Præcipe quod reddat* against two, the one disclaimed, and the other took the entire tenancy and vouched him who disclaimed, and the demandant confessed that he who disclaimed had nothing and counterpleaded the voucher, and by his confession the writ was abated by award. Br. Confessions, pl. 40. cites 21 E. 3. 33.

12. It is said, that in *trespass*, supposed to be done at a certain year and day, if the plaintiff afterwards in pleading confesses the trespass to be done at another year and day, his writ shall abate. Thel. Dig. 220. lib. 16. cap. 4. f. 8. cites 22 Ass. 86.

13. Where the writ is of tenements in divers vills, if the demandant confesses that none of the tenements is in one of the vills, the writ shall abate. Thel. Dig. 220. lib. 16. cap. 4. f. 10. cites Pasch. 25 E. 3. 41. but says the contrary is held Pasch. 29 E. 2. 39.

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14. In *trespass* of a close broken, and of oxen taken *vi & armis & contra pacem*, the defendant justified by commission of the king out of the Exchequer for a tax granted to the king, &c. And the plaintiff said that the place where, &c. is parcel of his parsonage, and so within sanctuary, &c. But because the plaintiff had confessed that the defendant came by warrant of the king, the writ with *vi & armis* was abated; for he ought to sue by replevin. Thel. Dig. 220. lib. 16. cap. 4. f. 11. cites Mich. 26 E. 3. 70. & 27 Ass. 66. & Mich. 28 E. 3. 97.

15. In *assise* it was pleaded that the plaintiff himself was seised, &c. And the plaintiff maintained his writ by the *souvent distress* of the tenant in claiming seignior, &c. to which the tenant said that the land was held of him by fealty and divers other services, &c. and that he distrained for the fealty arrear, &c. And the plaintiff said that the land was not held of him, &c. Upon which confession of the plaintiff it was held that the plaintiff had abated his own writ, because assise does not lie for *souvent distress*, * but [where the] lord [distrains]. Thel. Dig. 220. lib. 16. cap. 4. f. 9. cites 27 Ass. 51. Quære.

* Br. Disseisin, pl. 46. cites S. C. says it is no disseisin, but where the lord distrains; for if a stranger distrains, the tenant may make *refcous*, or *videtur*, as

Brooke says, and adds a quære; for that the plaintiff dared not demur. — Br. Disseisin, pl. 33. cites S. C. accordingly.

16. In writ brought against *Jo. Hammond of Cambridge*, one *Jo. Hammond of Cambridge* came, but the plaintiff said that he, who appeared, is not the same person whom he sued, &c. and that he sued against one *Jo. Hammond of South-Cambridge*, by which the writ was abated. Thel. Dig. 220. lib. 16. cap. 4. f. 13. cites Hill. 39 E. 3. 6.

17. *Trespass for a horse taken*; the defendant justified a distress for amercement for default in court baron, &c. and the plaintiff said that the taking was in the high street, &c. upon which it was held that the writ should abate, because he ought to have a special writ. Thel. Dig. 220. lib. 16. cap. 4. f. 14. cites Mich. 43 E. 3. 30.

18. In *trespass of goods taken*, if it appears by the confession of the plaintiff that the defendant took as lord within his fee, for any service, notwithstanding that no service be arrear, yet the writ shall abate. But if the defendant takes them for other cause, as claiming property, &c. which does not arise from the feignory, the writ shall not abate, notwithstanding that the defendant be lord. Thel. Dig. 220. lib. 16. cap. 4. f. 15. cites Pasch. 44 E. 3. 13.

19. In *rescous*, the defendant said that the place where, &c. was out of the fee of the plaintiff, and the plaintiff said that he would have taken them within his fee, and the defendant rescued them, and chased them to the place where, &c. the defendant said to be hors de son fee, and he freshly pursued them there, &c. and the defendant made rescous, &c. and held a good replication. Thel. Dig. 220. lib. 16. cap. 4. f. 16. cites Trin. 44 E. 3. 20.

20. In *assise* the tenant pleaded several pleas, and the plaintiff confessed the one and abridg'd his plaint thereof, and the writ did not abate for the rest, but had assise for the residue. Br. Confession, pl. 50. cites 45 Aff. 13.

21. In *debt against two executors*, the one pleaded that he unques administr'd, and the plaintiff confessed it; yet the other was put to answer. Thel. Dig. 219. lib. 16. cap. 4. f. 2. cites Mich. 34 E. 1. Brief. 856. but cites Pasch. 46 E. 3. 9. contra.

[355] 22. In *replevin*, if the defendant justifies that the defendant recover'd in such a county a certain sum of money against the plaintiff, and the defendant as bailiff took the beasts in execution, and sold them, and delivered them to the buyer, and delivered the money to him who recover'd the same, &c. the plaintiff may well plead matter in avoidance of the recovery, notwithstanding that he did not deny the property supposed by the defendant to be in the buyer of the beasts, &c. Thel. Dig. 220. lib. 16. cap. 4. f. 17. cites Mich. 7 H. 4. 27. and says see Mich. 47 E. 3. 12.

23. In *trespass of his servant taken out of his service vi & armis*, the plaintiff confessed by his replication, that the defendant had only procur'd the servant to go out of the service of the plaintiff, by which confession it was held that the writ should abate, and that the plaintiff ought to take writ upon the statute of labourers. Thel. Dig. 220. lib. 16. cap. 4. f. 18. cites Mich. 11 H. 4. 23. but says that some held the contrary, and adds *quære*.

24. In *debt or trespass*, if the plaintiff confesses parcel of his writ to be false, all shall abate. Thel. Dig. 220. lib. 16. cap. 4. f. 19. cites 11 H. 4. 56. & 1. H. 5. 7.

25. In

25. In *præcipe quod reddat* against 2, if the demandant acknowledges that the one has nothing, all the writ shall abate. Thel. Dig. 220. lib. 16. cap. 4. f. 21. cites Hill. 12 H. 4. 15.

26. Where the writ is of tenements in three vills, if the demandant confesses that one is neither vill nor hamlet, all shall abate. Thel. Dig. 220. lib. 16. cap. 4. f. 22. cites Trin. 1 H. 5. 7.

27. In trespass of battery brought within the county of Middlesex, it appeared by the confession of the plaintiff that the trespass was done within the palace of Westminster, and so out of the jurisdiction of the sheriff of Middlesex, by which it was held that the writ should abate. Thel. Dig. 220. lib. 16. cap. 4. f. 23. cites Pasch. 2 H. 6. 8.

28. In debt of 10l. the defendant, as to parcel, pleaded acquittance of the plaintiff, and confessed the rest, and the plaintiff pray'd judgment of that which is confessed, and had it, and said nothing to the acquittance; for if he had confessed the acquittance, all had abated. Thel. Dig. 221. lib. 16. cap. 4. f. 32, cites Trin. 3 H. 6. 49. Brief. 20.

session, pl. 37. cites 3 H. 6. 43. S. C. — Br. Debt, pl. 5, cites S. C. 3 H. 6. fol. 48. a. b. pl. 6. Panton v. Archer.

Fitch. Brief. pl. 2. cites Trin. 3 H. 6. 47. S. P. and plaintiff released his damages. — Br. Con-

* [The case is Trin.

29. Confession in *præcipe quod reddat* against two, that the one has nothing where the one appears and takes the entire tenancy and pleads in bar, and the other makes default, or appears, and says nothing, there if the demandant confesses that the one has nothing his writ shall abate. Br. Confession, pl. 19. cites 8 H. 6. 13.

per Jenney; so note a diversity between confession and nient desire. Br. Confession, pl. 19. cites 8 H. 6. 13.

30. In *assise*, if he confesses all to be in one of the vills the writ shall abate. Thel. Dig. 220. lib. 16. cap. 4. f. 22. cites 8 H. 6. 13.

31. It was said by June, that writ false in part shall not abate by the nient desire of the demandant, as it should do by his confession. Thel. Dig. 220. lib. 16. cap. 4. f. 24. cites Mich. 8 H. 6. 13.

32. If the demandant confesses non-tenure of parcel pleaded by the tenant the writ shall abate for all. Thel. Dig. 220. lib. 16. cap. 4. f. 25. cites Pasch. 18 H. 6. 5.

33. And so in writ against two, if the one accepts the entire tenancy, and the other says that he has nothing, the demandant may answer to the bar of the tenant without saying any thing to the other; but if he confesses that the other has nothing all shall abate. Thel. Dig. 220. lib. 16. cap. 4. f. 25. cites 18 H. 6. 7. and 37 H. 6. 18. and Mich. 5 E. 4. 126. [356]

34. Waste in a house, and breaking of a wall or pale, where it appears that waste does not lie for the wall or pale unless it was covered, the writ shall not abate in all, as if the party had confessed that his writ had not lain in part; for otherwise it is where it comes by surmise or writ or declaration; and so see a diversity between a confession of the plaintiff, and where the thing comes of the surmise of the plaintiff in his writ or declaration. Br. Confession, pl. 18. cites 22 H. 6. 24.

35. In trespass of a close broken against one who pleaded, that the place where, &c. was the franktenement of an abbot, &c. and that he

a:

Confession.

as servant, &c. to which the plaintiff replied, that he was seised, till by the defendant disseised to the use of the abbot, to which disseisin the abbot agreed, &c. And it was held that the writ should abate, because the plaintiff had confessed that he had cause of action against the abbot, who is not named, &c. Thel. Dig. 221. lib. 16. cap. 4. f. 27. cites Mich. 33 H. 6. 37. quære.

36. In debt it was said, that if the plaintiff confesses the receipt of parcel before or after the writ purchased, all the writ shall abate. Thel. Dig. 221. lib. 16. cap. 4. f. 28. cites Mich. 34 H. 6. 2. 6 E. 4. 7.

37. In maintenance against three, if the plaintiff in his replication confesses that they severally made several maintenances, all the writ shall abate. Thel. Dig. 220. lib. 16. cap. 4. f. 26. cites 36 H. 6. 29.

38. And so it is in trespass of goods taken, or of a close broken against several, if the plaintiff in his replication confesses that the one did parcel of the trespass, and another another parcel, the writ shall abate; and so it is in forger of false deed; but it is otherwise if such matter be upon the general issue found by verdict. Thel. Dig. 220. lib. 16. cap. 4. f. 26. cites 36 H. 6. 29. 31. and says see 11 H. 7. 7.

39. Where a man brings action by joint title, and in pleading confesses, that it is by several titles, the writ shall abate; contra if it be found by verdict and not confessed; note the diversity. Br. Confession, pl. 51. cites 36 H. 6. 28. per Moile, Prisot, and others.

40. In trespass, if it appears by the title of the plaintiff that another has cause of action with him, the writ shall abate by his confession. Thel. Dig. 221. lib. 16. cap. 4. f. 29. cites Pasch. 10 E. 4. 7.

[For more of Confession in general, see Abatement, Evidence, Nient-Dedire, Traverse, and other proper Titles.]

Confirm.

Confirmation.

(A) What it is, and the several Sorts.

1. **A** Confirmation is a conveyance of an estate or right in esse whereby a *voidable estate is made sure* and unavoidable, or whereby a *particular estate is increased*. Co. Litt. 295. b.

Confirmati-
on is the ap-
probation or
assent to an
estate al-

ready created, which, as far as is in the confirmer's power, makes it good and valid, so that the con-
firmation doth *not* regularly create an estate, but yet such words may be mingled in the confirmation,
as may create and enlarge an estate, but that is by the force of such words that are foreign to the
business of confirmation, and by their own force and power tend to create the estate. Gilb. Treat.
Ten. 69.

2. Every confirmation is either *perfecting*, *enlarging*, or *diminishing*. *Perfecting*; as if feoffee on condition makes a feoffment over, and the feoffor confirms the estate of the second feoffee to him and his heirs; for this does not make transmutation of the estate, but corroborates and perfects it, and makes it simple and absolute where it was conditional before, and with this accords 7 H. 6. 7. b. So if disseisor confirms the estate of the disseisor, or of his feoffee, this perfects and corroborates his estate; for this makes indefeasible, where before it was defeasible. 2dly, *Enlarging*; as when it enlarges the estate of him to whom the confirmation is made, as by enlarging an estate at will to an estate for years, &c. or if it be to an estate for years to encrease it for life, or to an estate for life to enlarge it to an estate tail, and so from a tail to a fee. 3dly, *Diminishing*; as where the lord confirms the estate of his tenant by knight-service to hold in socage, or by a less rent, or for a tenant in ancient demesne to hold at common-law; for thereby the customs of the manor are lessened; per Cur. 9 Rep. 142. a. Pasch. 10 Jac. in the Court of Wards, in Beaumont's case.

* [357]
Co. Litt.
295. b. S. P.
ad finem.—
S. C. cited
per Hobart
Ch. J. Hob.
257.

† [A. 2] The Acceptance of whom shall affirm the Lease, [&c.]

Fol. 475.

- [1. **I** *F* baron and feme lease by deed, and after the baron dies, and she takes a *second husband*, who *accepts the rent*, this affirms the lease against the feme perpetually, for she hath ‡ put her agreement into the mouth of her husband. D. 4, 5. Ma. 159. 36.]

† This in
Roll is (A).
But Ibid.
Brooke J.
held e con-
tra; and the
reporter
says, ideo
quære.

— S. C. cited 2 Roll. Rep. 132. — D. 156. Marg. pl. 36. cites Pasch. 22 Elis. Rot. 1587. that it was held per Cur. that by the acceptance of the second baron she is concluded during the term. — See tit. Baron and Feme (Z) and (E. a. 10).

Vol. V.

D 4

‡ The

† The book is, that she had resigned and assigned to the second baron her power of avoiding the term; as if she in her widowhood had told the termor, that she is content to accept the rent if the second baron agrees to it.

A. devised to M. his wife, until P. his daughter came to the age of 19

years, and afterwards to B. in tail; and farther if B. failed to pay after 19 years 12 l. to M. the wife, in recompence of her dower, that she should have the land for her life. M. brought dower and recovered. After B. came to the age of 19 years, M. the wife entered for non-payment of the 12 l. It was adjudged, that she having recovered the third part of her dower, should not have the 12 l. by the will, and the acceptance of the one is a waiver of the other. Cro. E. 128. pl. 3. Hill. 31 Eliz. B. R. Gossling v. Warburton. — Ow. 154, 155. Goodridge v. Warburton, S. C. adjudged. — Le. 136. pl. 187. Gellin v. Warburton, S. C. adjudged.

[2. If the baron seized in fee makes a feoffment, reserving 100 marks rent yearly for 20 years next ensuing to him and his wife, and dies, and his wife accepts the rent, yet this shall not make any bar in a writ of dower, because she demands a freehold, and that of the third part only. Tempore 1 E. 6. 5. adjudged.]

[358]

3. Mortdancestor; the tenant pleaded a recovery in cessavit against J. and the estate of the ancestor of the demandant mesne between the purchase of the writ and the judgment, and the demandant said that pending the writ J. aliened to his ancestor, and the demandant accepted the rent and the homage of his ancestor pending the writ, and so abated his writ, and by the best opinion it is a good replication; quære, for it was not pleaded before judgment in cessavit. Br. Barre, pl. 20. cites 21 E. 3. 18.

4. If an avator marries with the right heir, and has issue by her, and makes a lease for life, rendering rent, and he and his wife die, in this case the issue has the mere right on the part of his mother, and yet if he accepts the rent, and makes an acquittance, this shall estop him and his heirs to avoid the said lease, because he accepted the recompence. 8 Rep. 54. b. Mich. 6 Jac. and says, that with this agrees 39 H. 6. 27.

Where tenant in tail makes lease, reserving rent, and died without issue, he in remainder cannot

5. Tenant in tail, the remainder over, leases for years, rendering rent, and dies without issue, and he in remainder accepts the rent, this shall not bind him; the reason seems to be, because when the tail is determined, all that is comprised within it is determined, and so the lease void, and he in remainder does not claim by the lessor. Br. Acceptance, pl. 19. cites 1 E. 6.

by acceptance make it good, which case was agreed to be law; for the rent reserved, which is the recompence, cannot go to him in remainder for want of priority, and so it cannot be supposed for his advantage to have power to affirm the lease. Arg. 12 Mod. 363. Pasch. 12 W. 3. in case of Pullen v. Purbeck.

In the case of tenant at will the lease is at will of both parties, and by consequence must necessarily determine upon either parties ceasing to have a will of continuing it. Arg. 12 Mod. 363. Pasch. 12 W. 3. in case of Pullen v. Purbeck.

Br. N. C. pl. 16. 22. H. S. S. C. Br. Leases, pl. 19. cites 24 H. 3. Br. N. C. — 24 H. 3. pl. 54. S. P.

6. If tenant in dower leases for years, rendering rent, and dies, the lease is void, and acceptance by the heir of the rent will not make the lease good; for it was void before; contra of voidable leases, per Fitz-James and Englefield J. Br. Acceptance, pl. 14. cites 22 H. 8.

7. If a disseisor makes a lease for life, reserving rent, and afterwards grants the reversion to the disseisees, and he accepts the rent of the

the lessee, he shall not oust the lessee, quod fuit concessum per quosdam. Hill. 28 H. 8. D. 30. b. pl. 207. Canc. in case of Compton v. Brent.

8. If tenant in tail leases his land for 20 years, rendering rent, and dies, and the lessee leases it over to another for 10 years, and the issue accepts the rent of the second lessee, this is no affirmation of the lease, for there is no privity between the second lessee and him; contra if he pays it as bailiff of the first lessee, and if the first lessee had leased over all his term in parcel of the land leased, and the assignee pay the rent to the issue in tail, it seems that this affirms the entire lease; for rent upon a lease for years is not apportionable. Br. Acceptance, pl. 13. cites 32 H. 8.

Br. N. C.
32 H. 8.
pl. 166.
S. C.

9. Tenant in tail by gift of the king made a lease for years and died, his son and heir accepted the rent, and afterwards was attainted of treason, and executed, leaving a son. It was adjudged, that the acceptance of the rent did not make the lease good, for that the estate tail was determined by the attainder. D. 115. a. b. pl. 65, 66. Paich. 2 & 3 P. & M. Sir Thomas Wiat's case.

10. A lease for years was made by the provost of W. and confirmed by the dean and chapter, but not by the patron. Afterwards the deanry was dissolved, and a new one erected, to which the provostship was united, quodocunque vacare contingeret. The provost died, and the dean accepted the rent, and afterwards made a lease for years to another, which was confirmed by the bishop, dean, and chapter. It was adjudged, that the first lease is void by the death of the provost, and so not helped by the acceptance of the rent. D. 239. pl. 40, &c. Trin. 7 Eliz. Hodgeskins v. Tucker.

The reason why the lease was void notwithstanding the acceptance of the rent by the new dean, was because he was a new grantee by act of parliament, and not successor. Bendl. 80, 81. pl. 126. Mich. 2 & 3 Eliz. S. C. — S. C. cited

Arg. 3 Le. 158. in pl. 205.

* [359]

11. Tenant in tail leased for years rendering 20 s. rent, and afterwards released 19 s. thereof and died, and his issue accepted the 12 d. The question was, whether he might distrain for the 19 s.? The court were equally divided in their opinions, and the book leaves it a quære. D. 304. pl. 53. Mich. 13 & 14 Eliz. Anon.

12. Lands were given to a parson and his successors to find lights, &c. The parson made a lease thereof for life, reserving a rent, and after the dissolution of chantries, &c. he accepted the rent. Afterwards the queen granted the lands to another. The parson died, and the patentee entered. The court were of opinion the entry was lawful, and that the acceptance of the rent by the parson was void, because he then had no reversion in him. D. 337. b. pl. 38. Trin. 16 Eliz. Anon.

13. Acceptance of rent before the lease commences, and so before any rent is due, is no acceptance. Finch. 8vo. 68.

Br. Acceptance, pl. 12. cites 1 E. 6. S. P.

14. The master and fellows of M. college granted lands to the queen, rendering rent, upon condition to grant them over to B. and his heirs, which was done, and B. the grantee levied a fine, and afterwards granted them to another. The master died, and his suc-

Roll. Rep. 151 to 152. Warren v. Smith, S. C. adjudged. — 2 Bull. 146.

S. C. but
S. P. does
not appear.
—Cro. J.
364. pl. 2.
is a memo-
randum of
S. C. but
S. P. does
not appear.

cessors received the rent, and made an acquittance without seal to the last grantee, and after that re-entered. It was resolved, that this acceptance of the rent, especially as it was without seal, did not bar the college of their re-entry, being a body aggregate, and not to be divested of their right by the master's single act. 11 Rep. 66. b. to 79. Pasch. 13 Jac. Magdalen College's case.

15. Acceptance of *rent by a successor dean*, or other head of a body aggregate, will not make good a demise made by the predecessor, and which was not otherwise good, especially where the acceptance is without deed. 11 Rep. 79. a. Pasch. 13 Jac. in Magdalen College's case.

(B) *What Acts shall be a Confirmation of a Lease.*

3 Rep. 64. b. Trin. 38
Eliz. B. R.
Harvy v.
Oiwald,
alias Pen-
nant's case,
S. P. re-
solved
accordingly; for after the lease is determined he cannot distrain, and cites 14 Aff. 11. accordingly.
—Co. Litt. 211. b. S. P. ——— Pl. C. 133. b. Arg. cites 14 Aff. S. P. for by the distress he affirms the continuance of the term. And *ibid.* 136. a. S. C. cited on the other side and admitted.

[1.] If a man *leases for life, reserving rent, upon a condition of re-entry*, if after the condition is broke by non-payment of the rent, the *lessor distrains for the said rent*, this act shall be a confirmation of the lease, so that he cannot enter for the condition broke. 14 E. 3. Entry Congeable, 41. Issue upon it, and adjudged.]

[360] [2. *So if the rent be arrear for two years, being demanded, and after the lessor distrains for the rent of the first year*, this hath affirmed the lease, for the taking of the distress affirms the lease to have continuance at the time of the distress taken; for otherwise he could not distrain. Contra 14 E. 3. Entry Congeable, 41. admitted by the issue.]

Cro. E. 220.
pl. 10. in
the Exche-
quer S. C.
and all the
barons
agreed
that the lease was void immediately upon the non-payment, and judgment for the plaintiff. A note is added, that a writ of error was brought in Cam. Scacc. and error assigned in the matter of law, and the judgment was affirmed, Mich. 36 & 37 Eliz. ——— And. 303. pl. 314. S. C. and resolved by the greater part of the judges that the proviso tends to the limitation of the lease, and that it cannot be made good before entry or office, whether it be in the case of the king or a common person, whereupon the two chief justices delivered the opinion accordingly to the lord keeper and lord treasurer, and they affirmed the judgment in Mich. 36 & 37 Eliz. ——— Mo. 291. pl. 440. S. C. adjudged in the Exchequer, and affirmed in error; but says the judges differed much in opinion a long time; but at last, by the resolution of the greater part, after the death of Manwood and Gent (who joined in the judgment before) the judgment was affirmed.

[3. If *lessee for years, rendering rent, upon condition of non-payment to be void*; if the *rent be demanded at the day, and not paid*, the lease is absolutely void, so that it cannot be confirmed by acceptance of rent after. M. 32, 33 El. B. R. between Sir MOIL FINCH AND THROGMORTON, adjudged.]

Cro. E. 220,
221. S. C.
adjudged,
and judg-
[4. *So if the king, after such forfeiture, being lessor, accepts the rent from the lessee of record in the receipt of the Exchequer, yet this shall not confirm the lease, this being void before.* M. 32,
33 El.

33 El. B. R. between SIR MOIL FINCH AND THROGMORTON, *metastaffirmed. And Manwood.*
adjudged.]

said that the patentee immediately upon the non-payment was no longer a termor, nor tenant at will, nor at sufferance, but only as a bailiff or pignor of the profits de son tort, and then all the acceptance after cannot make a void lease good. — And. 303. pl. 314. S. C. adjudged, and judgment affirmed; and resolved by the greater part of the judges that this proviso tended to the limitation of the lease, and by breach thereof in this case of the queen, without demand, office, or other circumstance, the lease and estate is so determined, that it cannot by acceptance of the rent, before entry or office, be made good, be it in the case of the king or a common person. — Poph. 25 to 30. Finch v. Risley. S. C. argued. And Ibid. 53. S. C. adjudged; for the proviso shall be taken as a limitation to determine the estate, and not as a condition to undo [defeat] the estate, which cannot be defeated in case of a common person but by entry, and in the king's case but by office; and this judgment affirmed. — 2 Le. 134 to 146. S. C.

5. If *tenant for life grants a rent, and after surrenders, and then the lessor confirms the grant in the life of the tenant, who surrendered, and after the tenant dies, the rent remains by reason of the confirmation; per Seton. Br. Grants, pl. 73. cites 26 Aff. 38.*

6. If a *mortgagee leases for years, and the mortgagor confirms it, and after the condition is performed, the lease shall not be avoided. 7 Rep. 14. a. Mich. 33 & 34 Eliz. in Scacc. Englefield's case.*

7. *Lease for years, with condition upon non-payment of rent at a day certain to be void, no subsequent acceptance will make such a lease good; for there lessor has made his election by demanding his rent, without which the lease had not been void; and since by his own act, viz. the demand, he has made the lease void, there is no reason, that after, by another contrary act, he should make it good. Arg. 12 Mod. 363. in case of Pullen v. Purbeck, cites 3 Rep. Penant's case, which he said he agreed.*

8. If the *lessor brings assise for the rent, he waives the benefit of his re-entry, though it be for rent due at the same day; but if he re-enters first, then he may have action of debt for the rent arrear; per the reporter, 3 Rep. 65. a. in a nota, and says, this appears by Littleton, tit. Conditions, fol. 79. a.* *Litt. f. 343. Co. Litt. 211. b. S. P.*

(C) In what Cases an *Acceptance of Rent* or [361]
Service shall be a Confirmation.
[After Forfeiture, &c.]

[1.] If a *copyholder commits a forfeiture in cutting down of trees, and after the lord, not having notice thereof, accepts the rent from him, yet this shall not affirm the lease, but he may well after avoid it. 5 Jac. B. R. between MANTELL AND WACHINGTON, per Curiam, agreed.]* *Cro. J. 166. pl. 4. S. C. but no resolution was given therein. S. P. oy*

Crooke J. held accordingly. Arg. Bullf. 190. — Godb. 47. pl. 58. Mich. 28 & 29 Eliz. B. R. the S. P. was in question, and Coke said the lord was not concluded by this acceptance; for it is not as the case 45 E. 3. where a lease is made upon condition that the lessee shall not do waste, and he commits waste, and then the lessor accepts the rent, there he cannot enter; but otherwise it is of a copyhold, for there is a condition in law, and here *en fait*; and a condition *en fait* may save the land by an acceptance, but a condition in law cannot; for by the condition in law broken, the estate of the copyholder is merely void; and the court agreed that when such a forfeiture is presented, it is not to intitle the lord, but to give him notice; for the copyhold is in him by the forfeiture presently, without any presentment.

Fol. 476.

Cro. C. 511.
pl. 6. Mul-
carry v.
Eyes, S. C.
the condi-
tion was, that
if the lessee
should lease
only part for
more than
three years,

the lease (which was for 21 years) should be void, and the lessor to re-enter. The lessee leased for 3 years, and so from 3 years to 3 years, during the term of 21 years, if he so long lived. The lessor accepted the rent of the assignee, and afterwards re-entered. Resolved, that it was a plain breach of the condition, and that the acceptance after could not dispense therewith, the condition being that it should be void, and that so it was absolutely determined; and so the judgment in Ireland was reversed.

[2. If a man *leases for years*, rendering rent, upon condition that if the lessee assigns it without licence of the lessor, the lease shall be void; and after the lessee assigns the term to B. from whom the lessor accepts rent after due, having knowledge of the assignment, yet this does not make the lease good, in as much as the lease, by the assignment, was absolutely void, and not voidable only. M. 14 Car. B. R. between OMULCOURT AND AIRES, adjudged, per Curiam, in a writ of error upon a judgment in Ireland, upon a special verdict there, and the judgment given to the contrary reversed accordingly. Intratur, M. 13 Car. Rot, 332.]

Br. In-
cumbent,
pl. 18. cites
S. C. —
S. P. Br.
Acceptance,
pl. 26. cites
S. S. —
S. C. cited
per Dode-
ridge J.
a Buif. 47.
and said that
the differ-
ence is be-

3. If a *parson leases for life*, rendering rent, and dies, and the successor receives *fealty*, the lease is affirmed; per Stone; and he charged the jury of it for law. Br. Acceptance, pl. 15. cites 11 E. 3. Fitzh. Abbe, 9. & Juris Utrum, 3.

4. And in *juris utrum* the defendant pleaded a *lease for life by R. S. predecessor of the plaintiff*, rendering rent, and that the plaintiff had accepted the rent, and a good plea by the opinion of the court; and it does not appear in the book whether the lessor was parson, vicar, or prebendary, but it is all one as it seems, and agreed with F.N.B. 50. Br. Acceptance, pl. 15. cites 11 E. 3. Fitzh. Abbe, 9. & Juris Utrum, 3;

tween a lease for years and a lease for life. — Br. Leases, pl. 19. cites 24 H. 8. by Fitz-James Ch. J. Englefield J. and several others, that a lease for years in such case is void; but Brooke says, it seems, that contracts of a lease for life made by parson, rendering rent, and the successor accepts the rent, this affirms the lease for life, but contrary of a lease for years; for when this is void by death of the lessor, it cannot be perfected by any acceptance. — Br. N. C. pl. 54. Anno 24 H. 8. S. C. accordingly. — S. P. as to a lease for years by parson who dies. Br. Acceptance, pl. 14. cites M. 2 H. 4. 5. — S. C. of a prebendary's lease. Ibid. cites 11 H. 4. 15. — S. P. as to a lease for years by parson, vicar, or prebend; but contra of such lease by bishop, abbot, &c. because it was voidable only. 3 Rep. 65. a. and same cases cited per Cur. But the reporter says, * Nota, Reader, it seems to me, that in case of a lease for life, if the lessor accepts the same rent which was demanded, he thereby affirms the lease; for he cannot receive it as due upon any contract, as in case of a lease for years, but he must receive it as his rent, and then he has affirmed the lease to continue; for when he has accepted the rent, he cannot have action of debt for it, but his remedy then is by assise, if he had seisin, or by distress; and so he says it seems to him in such case, that the acceptance of the rent will bar him of his re-entry.

* [362]

Br. Accept-
ance, pl. 23.
S. P. per
Markham
J. to which
it was not
answered, cites 21 H. 6. 25.

5. If the lord avows in a court of record, and the tenant disclaims, the lord may have writ of right upon disclaimer; but if he accepts the rent after, he shall be concluded in a writ of right upon disclaimer. Br. Barre, pl. 27. cites 21 H. 6. 24.

S. P. of a
prior, and
in of an ab-
bot; per
Cur. Br.
Abbe, pl.
26. cites 37 H. 6. 4.

6. Acceptance of a rent by successor of prior, who leased for years, affirms and perfects the lease; contra where a parson leases for years, rendering rent, and dies, and the successor receives the rent. Br. Acceptance, pl. 9. cites 37 H. 6. 3, 4.

7. In waste, a man leased land at will, rendering rent, and died; the heir accepted the rent; this does not make the lease good, because acceptance cannot make a void lease good, nor make a lease determined by a re-entry, &c. to be good; per Rowe Serjeant; quod non negatur. Br. Acceptance, pl. 7. cites 14 H. 8. 11.

But if a lease for years be with condition not to commit waste, and the lessor accepts of the rent for the

quarter in which the waste is done, this shall not bar his entry; but if he accepts of a second payment, then it is otherwise. Godb. 47. pl. 58. Mich. 28 & 29 Eliz. Anon. — But if the lease be upon condition that the estate shall not cease on waste done, there no acceptance of the rent by the lessor can make it good. Ibid.

8. A man seised in fee leased for 10 years, and took a feme, and thereof conveyed estate to him and his feme, and to the heirs of the baron, and after the baron and feme leased to another for 20 years, rendering rent. The baron died, the feme accepted the rent during the 10 years, and by this the 2d lease for 20 years is not affirmed; but after the 10 years ended she may enter; for acceptance before the lease commenced cannot make it perfect. Br. Acceptance, pl. 18. cites 1 E. 6.

9. A lease for years was made for ten years rendering rent upon condition of re-entry, if the lessee, &c. granted or assigned the same or any part thereof without assent of the lessor, &c. The lessee granted part of term without his assent, and afterwards the lessor accepted all the rent from the lessee, but did not then know that the condition was broken; and adjudged on demurrer for the plaintiff, that the condition being collateral, the acceptance of the rent should not make the re-entry void; for notice in this case is material. 3 Rep. 64. 2. Trin. 38 Eliz. B. R. Pennant's case.

Mo. 456. pl. 626. Harvey v. Ofwold S.C. accordingly; but if he had notice, the acceptance, it seems, would be a bar, though the condition was collateral.

ral; per Gawdy and Popham. — Cro. E. 553. pl. 4. Pasch. 39 Eliz. S. C. and Clench and Popham being only in court, Clench held the entry not concealable, but Popham e contra; but Popham said, that if the condition be of such a nature that the performance or non-performance thereof lies in the conscience as well of the lessor as of the lessee, it is otherwise; et adjournatur. — Ibid. 572. pl. 12. Trin. 39 Eliz. S. C. adjudged for the plaintiff by Fenner, Gawdy, and Popham; but Fenner said, if the lessor had accepted rent from the lessee, that would have affirmed the lease, for thereby he took notice of the alienation. — S. C. cited Mo. 425. in pl. 594. — S. C. cited by the name of Harvey v. Tanner, 2 And. 90 in pl. 54. — But Godb. 47. pl. 58. Mich. 28 & 29 Eliz. B. R. it was said [per Cur. as it seems] that a man made a lease for years upon condition that he should not assign over his lease, and it was reserving rent; and after he did assign, and then the lessor accepted the rent, there he shall not enter for the condition broken. — Where the lessor accepted rent by the hands of the executrix of the assignee, all the court held that this acceptance shall bar him of his entry; for it being accepted by his own hands, it shall be intended that he had notice she was to pay it, and the allegation by the executrix by way of sciens is sufficient; and if the lessor had no notice, the lessor ought to shew it on his part; and judgment accordingly. Cro. J. 398. pl. 4. Pasch. 14 Jac. B. R. Whitecot v. Fox. — Roll. Rep. 70. pl. 12. Mich. 12 Jac. Hitchcock v. Fox, S. C. C. like thought sciens not to be issuable, and therefore not well alleged, but perhaps the other had confessed it, and so made the plea good; adjournatur. — Ibid. 390. pl. 10. Trin. 14 Jac. said by the counsel Arg. that this was in a manner over-ruled by the court at a day before, that sciens was good, and therefore he did not rely upon it. — 2 Bulst. 290. S. C. adjudged.

* [363]

10. But per Cur. there is a difference between a lease for life and for years; for in the first case, if the conclusion of a conditioned annexed to the rent (or the collateral act) be, that then the lease shall be void, there, (because the estate of freehold being created by livery cannot be determined before entry,) the acceptance of rent due at a day after shall bar the lessor of his entry;

D d 4

for

for this voidable lease may well be affirmed by acceptance of the rent. 3 Rep. 64. b. 65. a. Trin. 38 Eliz. B. R. in Pennant's case.

2 And. 42. pl. 28. S. C. two judges held the entry was gone and determined, but one was of a contrary opinion. — 2 And. 90. pl. 54. S. C. entry. Mo. 425. pl. 594. Hill. 28 Eliz. Marsh v. Curteis. says, that three judges held that this acceptance should not hinder, but that he might enter and avoid the lease; for it might be that the lessor had no notice of the breach of the condition, and if so it would be hard to conclude him, and by such means any man might be defrauded of the benefit of his condition. — Cro. E. 528. pl. 57. S. C. that Anderson and Beaumont held the acceptance should bar him of his entry, for he accepted it as rent due to him by the lease, which cannot be if the estate be undone by an act precedent, but Walmesley J. contra; it was afterwards adjudged for the plaintiff (the lessor). — Brownl. 78. S. C. — 3 Rep. 65. a. cites S. C. as adjudged by Anderson Ch. J. and Walmesley J. and all the court, that though the lessor accepted the rent of the lessee, yet as he had no notice of the assignment the acceptance should not conclude him of his entry. — Noy, 7. S. C. and the entry adjudged lawful; and that the acceptance does not take it away; for the condition is for a collateral thing; but otherwise it is of a condition to re-enter for non-payment of rent, according to Pennant's case in Coke's Reports.

Mo. 600. pl. 829. S. C. adjudged by all the justices, that the plaintiff shall be barred. —

12. Debt against an administrator for rent, who pleaded, that before it incurred he had assigned the term to a stranger, and of whom the lessor had accepted rent, knowing of the assignment; it was held clearly, that by the acceptance the administrator was not chargeable afterwards. Cro. E. 715. pl. 39. Mich. 41 and 42 Eliz. B. R. Marrow v. Turpin.

2 And. 133. pl. 79. S. C. adjudged that the action does not lie. — 3 Rep. 24. a. b. S. C. cited as adjudged accordingly.

13. If one enters into my land and claims for 20 years, though he is a disseisor and cannot qualify his own wrong, yet the disseisor may admit him to be tenant for years if he accepts the rent or brings waste, as Carret said, 14 H. 4. But has only for years in respect of his claim; but by accepting the rent, or bringing the action of waste, he is concluded; per Yelverton. Godb. 384, 385, pl. 472. Pasch, 3 Car. B. R.

[364] (D) *What shall be a sufficient Acceptance to make a Confirmation.*

[And by whom. Successor, &c.]

Cro. C. 95, 96. S. C. cited as adjudged in C. B. and Crooke says, that the copy [1.] If a bishop leases for life certain land parcel of the manor of D. reserving rent, and dies, and another bishop is made, and the bailiff of the manor comes to him, and shews him in a general manner, that there are certain rents of the said manor arrear; upon which the bishop commands him to receive the said rents, and he receives

ceives them accordingly, and amongst them *receives the said rent reserved upon the said lease, and after delivers over all the said rents to the bishop, without giving him notice of the said lease.* This is a confirmation of the said lease; for the bishop of himself ought to take notice of the leases made by his predecessor. Hill. 5 Jac. between WHEELER AND DANBY, per Curiam, adjudged.]

of the record was brought to him, whereby he saw that judgment was given upon the verdict for

the defendant; but he makes a quere, whether it was for this cause alleged, or for that the plaintiff's lease, by which he claimed from the bishop, and whereupon he brought ejectment, was not warranted by the statute of Eliz.

2. If lands are given to baron and feme and the heirs of the body of the baron, and the baron leases for forty years, and dies, and the issue in tail accepts the rent in the life of the feme, &c. This is no confirmation so as to bind the issue after the death of the feme; for at the time of the acceptance no rent was in esse, or due to him. 3 Co. 64. b. per Curiam, Trin. 38 Eliz. B. R. cites Br. Acceptance [pl. 13.], 32 H. 8.

3. A bishop made a lease for years to H. and G. which was not confirmed, and afterwards he made another lease to G. which was confirmed by the dean and chapter, and died; it was held by several, that the first lease was void, and yet they agreed the abbot or bishop, or such as have estate of inheritance, may make lease for years rendering rent, and by their death the lease is only voidable at the pleasure of the successors, for if they accept the rent the lease is good; but that here the power of the successor, to make the first lease good by acceptance of the rent, is restrained by the lease made by the predecessor and the chapter. The case was moved in Bank. And the justices doubted; for some said, that the lease was surrendered for the moiety, and remained only for the residue; but the reporter says, quere legem bene; for the parties submitted it to an arbitrement. D. 46. a. b. Mich. 32 H. 8. Herreyong v. Goddard.

4. G. leased for years rendering rent, with clause of re-entry; the rent due at Lady-day was behind, being demanded at the day, which rent the lessor afterwards accepted, and then entered for the condition broken, and his entry holden lawful; for the rent was due before the condition broken; but if the lessor accepts the next quarter's rent, then he hath lost the benefit of re-entry; for thereby he admits the lessee to be his tenant. And if the lessor distrains for rent due at the said feast of Annunciation after the forfeiture, he cannot afterwards re-enter for the said forfeiture; for by his distress he hath affirmed the possession of the lessee; so if he makes an acquittance for the rent as a rent, contrary if the acquittance be but for a sum of money, and not expressly for the rent, all which tota Curia concessit. Le. 202. pl. 348. 18 Eliz. B. R. Greene's case.

Cro. E. 3. pl. 6. Hill. 24 Eliz. B. R. the S. C. that two days after the demand the lessor received the rent and made the lessee an acquittance by the name of his farmer; and it was clearly resolved,

that the bare receipt of the rent after the day was no bar, for it was a duty to him; but a distress for the rent, or a receipt of the rent due at another day, was a bar, for those acts do affirm the lessee to have lawful possession; so if he maketh him an acquittance with a recital that he is his tenant, and in this case by calling him his farmer, this is a full declaration of his meaning to continue him his tenant; and it was adjudged, that the entry was not lawful.

* [365]

Br. Acceptance, pl. 11. cites 19 Aff. 9. S. P. but e contra upon a lease voidable. — S. P. by Bridgman Ch. J. Cart. 16. Mich. 16 Car. 2. C. B. in the Dean and Chapter of Westminster's case.

5. Acceptance of *rent on a void lease* shall not bind the successor where the lease is void *on the statute*, but *otherwise at common law*. Cro. J. 173. pl. 14. Trin. 5 Jac. B. R. Rickman v. Garth.

S. P. Br. Acceptance, pl. 10. cites 21 H. 7. 38. So if *tenor in tail leases* by land and dies, and the *issue in tail accepts the rent*, the lease is affirmed good.

6. Bargain and sale by *baron and feme* of the wife's land reserving a rent; if after the death of the baron the *feme accepts the rent*, it will bar her of her entry; agreed by counsel. Roll. Rep. 154. Pasch. 13 Jac. B. R.

(E) *What shall be a Lease or Grant confirmable.*
[And *what shall be a sufficient Confirmation in respect of the Persons making it. Things Spiritual.*]

The parson, without the patron and ordinary, cannot bind his successor. Br. Dean and Chapter, &c. pl. 6. cites S. C. — If parson leases for years, or charges the church, and the patron or ordinary confirms it, this shall bind the successor. Br. Leases, pl. 64. cites 33 H. 8.

[1. *TO make a parsonage chargeable*, three things are necessary, viz. that the charge be made *by the parson, patron, and ordinary*. 14 H. 4. 18. b.]

Br. Dean and Chapter, &c. pl. 6. cites S. C. but neither Brooke, nor the Year-book, takes notice of any confirmation by the ordinary, or any other; and there it is held, that arbitrement cannot give franktenement without deed.

[2. [As] If upon a *suit for tithes* by a parson, which he claims by prescription, the parties *submit themselves to the award of the commissary, who awards*, that the defendant shall pay an *annuity to the parson for the tithes*, which award is *confirmed by the ordinary, but not by the patron*; this shall not bind the successor. 14 H. 4. 18. b.]

Br. Confirmation, pl. 15. cites S. C. that it is good during the time limited by the parson, if the patron and ordinary confirm it. — Br. Grants, pl. 73. cites S. C. and S. P. by Norton.

[3. If a *parson grants an annuity in fee*, though this is determinable by his death, yet if the *patron and ordinary confirm it*, it shall bind perpetually. * 26 Aff. 38. per Norton, 16 E. 3. 24. admitted.]

4. Confirmation of a *rent or seignior* is not good, but in respect of a former estate or deed; and therefore if the *first deed be lost*, or be *before time of memory*, the confirmation is not good; per Hull & Skrene, & non negatur. Br. Confirmation, pl. 24. cites 12 H. 4. 23.

5. If a *bishop grants fee to the steward for term of life, or leases land for term of life, and dies*, and the *successor confirms it*, this is good; for the lease was not void, but voidable; per Danby Ch. J. but per Moyle and Choke J. it is void by the death of the bishop, lessor,

for, quod contrarium est, as it seems; for bishop, dean, and prebend have fee; but contra of a parson, for there the fee is in abeyance. Br. Confirmation, pl. 17. cites 5 E. 4. 105.

6. A parson makes a lease for years, or grants a rent-charge to begin after his death. The patron and ordinary confirmed it. It seems good to bind the successor, because it is granted and charged immediately, although it take not effect in the life of the grantor; but Mountague doubted of the case. D. 69. pl. 30. Pasch. 5 E. 6. Anon.

Ibid. Marg. says this case was urged, and affirmed for good law by Gawdy, and that the other justices in a

manner affirmed it, 44 Eliz. B. R.

7. In trespass, the defendant pleaded in bar, that the plaintiff within age made a feoffment in fee of the lands to the father of the defendant rendering rent, and that afterwards the plaintiff confirmed the premises to the defendant's father, habendum to him and his heirs, and that his said father died seised, and the lands descended to him as son and heir, but judgment for the plaintiff; for it was not averred in fact that his father was seised in fee at the time of the confirmation, and if he was not then the confirmation is void, and in this case the land could not pass by the confirmation, unless it enured upon a privity by way of enlargement of estate. D. 108. b. 109. a. b. Mich. 1 & 2 P. & M. Rugway v. Wolcott.

8. A bishop made a lease for years, which was confirmed by the dean and chapter, and afterwards he let the same land to another for 20 years, to commence after the first 20 years, and then, before any confirmation of it, he let the same lands to a third person for 60 years, to commence immediately. The last lease was first confirmed, and after the lease in reversion was confirmed also. Resolved by 3 justices, contra Browne, that that lease was good, and the confirmation good, notwithstanding the last lease was first confirmed, for the lease is not to have any interest by the confirmation, but only to make it perdurable and effectual. Mo. 66. pl. 180. Trin. 6 Eliz. Anon.

S. C. cited Show. 381.

9. A. B. and C. were lessees at will. A. died. Afterwards the lessor, reciting A.'s death and the former lease, and that B. and C. had surrendered the lease, granted them a new estate, habendum eis & heredibus suis, but there was no warrant of attorney to make livery. The court were of opinion, that the estate at will was determined, so that the second grant could not enure as a confirmation to give a fee-simple to B. and C. as it might have done if they had been tenants at will. D. 269. b. pl. 20. Hill. 10 Eliz.

Ibid. a square is added, whether the tenancy at will was not determined by the death of A. one of the lessees; because nothing survives by his death.

10. The grant of an annuity made by a prebendary before his installation and induction is void to charge the prebend; by the opinion of all the justices. Pl. C. 429. b. Trin. 20 Eliz. Hare v. Bickley.

(F) *Who shall be a sufficient Person to make a Confirmation.*

[Or, what shall be a Lease or Grant confirmable in respect of the Lessor or Grantor.]

Cro. E. 775. [1. IF a layman be presented, instituted, and inducted to a benefice, and before the statute of the 13 Eliz. makes a lease for years of his * benefice, which is confirmed by the patron and ordinary, and after the incumbent is deprived, because he was a mere lay person, yet the lease is good; for he was parson de facto for the time, and so the lease not void, and therefore well enough confirmed. Trin. 42 Eliz. B. R. between CUSTOR AND WINDATE adjudged, which intratur Patch. 42 Eliz. Rot. 127.]
 pl. 5. Costard v. Winder, S. C. accordingly by Popham and Fenner, but Gawdy e contra, and they resolved to have it adjudged accordingly, Gawdy assenting, and Clench absente; but for other defects the judgment was stayed. — Mo. 606. pl. 836. Costard v. Wingate, S. C. agreed, that a parson being a lay-man ought to be deprived; or otherwise all his acts shall be good as lawful parson till deprivation.

* [367]

Br. Non est Factum, pl. 3. cites 9 H. 6. [2. If a parson makes a lease or grant, or such like, and this is confirmed by the patron and ordinary, and after the parson is deprived for a pre-contract, (this was when priests could not marry,) yet the grant shall be good. 9 H. 6. 33. b. for he was a lawful parson at the confirmation.]

6. 32. where it was held, that the grant of such a parson or abbot shall bind, because he was abbot or parson in possession. [But mentions nothing of the confirmation, which seems admitted.] — Br. Abbot, pl. 19. cites S. C. that the grant of such is good. — Bishops not consecrated are not bishops, and therefore a lease for years by such, and confirmed by the dean and chapter, shall not bind the successor, because they never were bishops; but e contra of bishops deprived, who were bishops de facto at the time of the lease and confirmation made. Note the diversity. Br. Leases, pl. 68. cites 2 M. 1. — Br. N. C. 2 M. pl. 463. S. C.

Br. Non est Factum, pl. 3. cites 9 H. 6. 32. [3. If the church be full of a parson, and after another is made parson, and inducted by the ordinary, and he makes a grant, which is confirmed by the patron and ordinary, yet the grant is void, because he was not parson at the time of the grant. 9 H. 6. 34.]
 S. C. that the grant of such is not good.

† Br. Non est Factum, pl. 3. cites 9 H. 6. 32. [4. If a church be void, and one enters and occupies of his own wrong, without any presentation or institution, and occupies it as parson, and makes a grant. which is confirmed by the patron and ordinary, yet this is void, because the grantor was not parson. 9 H. 6. 34. Curia. One cannot be parson without a presentation or collation. § 10 H. 6. 11.]
 S. C. that the grant of such is not good.

§ Br. Dean and Chapter, pl. 23. cites S. C. that by his entry he cannot be vicar; but e contra by presentation and induction, and that the person of the vicar is charged. — Fitzh. Brief, pl. 65. cites 10 H. 6. 10. S. C.

5. Where the bishop de facto made a lease, which was confirmed by the dean and chapter, and after the bishop de jure died in the life of the bishop

bishop de facto. It was resolved, that he not being lawful bishop, and this lease being to charge the possessions of the bishoprick, it is void, although all *judicial acts*, as admissions, institutions, certificates, &c. shall be good; but not such voluntary acts as tend to the depauperation of the successor, and so affirmed a judgment given in B.R. in Ireland. Cro. J. 552. 554. pl. 15. Mich. 17 Jac. B. R. Rouan Obrian & al' v. Knivan.

6. A parson made a lease of his rectory for 60 years, which was confirmed by the succeeding bishop, and the succeeding patron, neither of them being bishop or patron at the time when the lease was made, yet adjudged per tot. Cur. that it was good. Cro. C. 38. pl. 3. Trin. 2 Car. C. B. Banister's case.

(G) In what Cases the Confirmation of the Patron [368]
and Ordinary is necessary.

[1. IF a prior and a parson, upon a debate of the patronage of the parsonage, submit themselves to the ordinary, who ordains, that the prior shall give to the parson certain tithes, and the parson grants to the prior an annuity, with the assent of the ordinary, and after the parson dies, and the successor takes the tithes, he may be charged with the annuity, though the patron never confirmed it; for in as much as he is seised of the tithes, he hath quid pro quo. 16 Ed. 3. 24. adjudged.]

2. If a parson charges with leave of the patron and ordinary, this is not good after the death of the parson; for there ought to have been a confirmation of the patron and ordinary; per Hill, but Rickhill contra, by which Rickhill awarded the party to answer to such grant made by the parson with leave of the patron and ordinary; but Brooke makes a quære of this award. Br. Confirmation, pl. 30. cites 7 H. 4. 15, 16.

For in the time of H. 8. the bishop of London granted the stewardship of his lands to Aldred Fitz-James, by

assent of the dean and chapter, and died, by which the grantee lost his office, as it is said, because the dean and chapter had not confirmed it; quod nota; and yet per Littleton, in the end of the chapter of Discontinuance, a parson may charge by assent of the patron and ordinary; for the writ of entry upon such discontinuance is *brief de entre fine assensu capituli*, or *fine assensu confratrum & priorum*, but those seem to be all in one and the same corporation, but more was in the grant of the bishop of London, as misnomsmer, &c. for the said Aldred Fitz-James was named Etheldredus, where it should be Aldredus, and so was misnamed, and also the deed was, quod sigillum nostrum apposuitimus, which may be referred to the bishop only, and not to the bishop, dean, and chapter; and therefore by several, at this day, the grant was avoided for those causes, and not for the other cause, and so a grant with assent of the dean and chapter with all perfumptions is good. Br. Confirmation, pl. 30. cites 7 H. 4. 15, 16. — S. C. cited Lanc, 38.

3. If parson or vicar makes a lease for 3 lives, or 21 years, of lands accustomedly letten, reserving the accustomed rent, it must be also confirmed by the patron and ordinary, because it is excepted out of the 32 H. 8. and not restrained by the stat. 13 Eliz. Co. Litt. 44. b.

4. There is a diversity between a sole corporation, as parson, prebendary, vicar, and the like, that have not the absolute fee in them, for to their grants the patron must give his consent. But if there be a corporation aggregate of many, as dean and chapter, master, fellows, and scholars of a college, abbot, or prior and convent, and the like,

or any sole corporation that has the absolute fee, as a bishop with consent of the dean and chapter, they may by the common law make any grant of or out of their possessions, without their founder or patron, albeit the abbot or prior, &c. were presentable; and so it is of a bishop, because the whole estate and right of the land was in them, and they may respectively maintain a writ of right. Co. Litt. 300. b.

[369] (H) *By the Dean and Chapter [or others] of the Grant of the Bishop.*

[1. BY the *feodal law*, the bishop non potest dare in feodum, a thing that had used to be given in feodum, without the assent of the chapter. Antonii Contii methodus, 52. It is there said that this is a great question.]

[2. By the law of *Scotland*, episcopi nec abbates possunt de terris suis aliquam partem donare ad remanentiam sine assensu & confirmatione domini regis quia eorum baroniz sunt de eleemosyna domini regis, & antecessorum suorum. Skene Regiam Majestatem, 48. 1, 2.]

[3. A grant by the bishop of Meath in Ireland by the assent of his clergy, he not having any dean and chapter, is a good grant without other confirmation. Davies's case of Proxies, 1. admitted.]

[4. If a bishop hath two chapters which used to confirm grants made by him, as the bishop of Coventry and Litchfield had, the prior and convent of Coventry, and the dean and chapter of Litchfield, and a grant of the bishop is confirmed by the prior and convent only, and not by the dean and chapter, this is no good confirmation to bind the successor. Temp. * R. 2. fol. 104. D. 11 El. 282. 27. Statham. Aff. 50 Ed. 3. but it is not in the book in print.]

Co. Litt. 301. a. in principio. S. P. — * S. C. cited by Coke, Arg. Le. 234. in pl. 317. for both are but one chapter in respect of the bishop; for if the bishop is chosen by both chapters, there a confirmation must be by both. — Fitzh. Grants, pl. 104. cites S. C.

D. 282. b. pl. 26. the Archbishop of Dublin v. Bruerton. — S. C. cited by Coke, Arg. Le. 234. in pl. 317. and admitted, because the surrender was by act of parliament, and so one sole chapter remained. — Co. Litt. 391. a. in principio, S. P.

[5. If the dean and chapter of Christ-church and St. Patrick used a *tempore*, &c. to confirm the grants made by the archbishop of Dublin, and yet Christ-church is known to be the eldest chapter to the see, and the dean and chapter of St. Patrick, by their chapter-seal, give and surrender to the king in fee all their said church, house, lands, and possessions, but without the licence, will, or consent of their bishop, being their chief ordinary, and patron, for the most part, of all the prebends; and after a lease made by the bishop is confirmed only by the dean and chapter of Christ-church; this confirmation shall bind the successor bishop, because the corporation and chapter of St. Patrick, which was the other chapter, was dissolved, and determined lawfully, and without the consent of the archbishop. D. 11 El. 283. 27.]

[6. If

[6. If the prior of Bath, and dean and chapter of Wells, have used (*) *de tempore, &c.* to confirm grants made by the bishop of Bath and Wells; and after by the statute of the 31 H. 8. the priory of Bath is dissolved, and a lease made by the bishop is confirmed by the dean and chapter of Wells only, the other chapter being dissolved by the statute; it seems this confirmation shall bind the successor bishop. D. 37 H. 8. 58. 7. Quære; but 34 H. 8. cap. 15. an act of parliament is recited, that it was a great doubt whether it was a good confirmation, and therefore it is enacted, that all the said confirmations, and all after to be made by the dean and chapter, should be good in law.]

Fol. 478.

[7. If a bishop makes a lease for years to the king, and before inrollment of the lease the dean and chapter confirms it, and after the lease is inrolled, this is a good confirmation, though the lease is not in esse at the time of the confirmation; for this is but an assent, which may as well be before the lease as after. Trin. 8 Jac. Scaccario. SIR EDWARD DIMMOCK'S CASE.]

Lane, 31.
S. C. argued
Ibid. 35.
S. C. argued
Ibid. 60.
S. C. argued
by the
court, and
S. P. agreed

by all the barons, and judgment against the king as to the mesne profits. — Co. Litt. 301. a. S. P. — If a bishop makes a lease the 2d of May, and the dean and chapter confirm it the 1st of May, this is a good lease after the bishop's death; per Catlin and Southcote. Wray asked how a lease could be confirmed before it was made; to which Catlin and Southcote replied, that the assent before is a good confirmation after. Ow. 33. Hill. 8 Eliz. Anon.

† [370]

8. If the chapter confirms the grant of the bishop after his death it is void; for it ought to have perfection in the bishop's life. Arg. Godb. 25. cites 31 E. 3. pl. 20. & 33 E. 3. Confirmation, 20.

9. If the chapter confirms the lease of the bishop after his death, in time of vacation, this confirmation shall not bar the successor. Fitzh. Confirmation, pl. 22. cites Hill. 33 E. 3.

S. C. cited
Arg. Godb.
25. in pl.
35. for it
ought to

have perfection in the life of the bishop, otherwise it is void. — Bishop made a lease for 21 years, and another lease of the same land being in being not expired by 4 years, and died, in time of vacation dean and chapter confirmed it; per Clench it is a good confirmation. 4 Le. 78. pl. 166. 28 Eliz. C. B. Grindall Archbishop's case.

10. If the bishop be patron and ordinary, and confirms [a lease for years], there must be the confirmation of the dean and chapter also; for the bishop, as ordinary, does nothing by his confirmation but a judicial act, and as patron he has the inheritance thereof in jure ecclesiæ, which he cannot bind against his successor without confirmation by the dean and chapter. Br. Leafes, pl. 64. cites 33 H. 8.

11. In debt the plaintiff declared that the predecessor of the bishop granted to him the office of keeper of the bishop's mansion-house of D. for the term of his life, with the fee of 2d. per diem to be issuing and paid out of the profits of the rents and farm of D. by the receiver of the bishop, and also an yearly robe, which grant was confirmed by the dean and chapter, that the bishop died, and the defendant was elected bishop, and for arrearages of the money and robes for 8 years the plaintiff brought his action against the successor bishop, who pleaded that the plaintiff did not exercise the said office. The jury found for the plaintiff, and he had judgment to recover the robes and

Bendl. 182.
pl. 226.
S. C. ad-
judged.

and annuity, and the arrearages incurred as well before as after the bringing the original. Mo. 88. pl. 220. Hill. 10 Eliz. Howse v. Ely (Bishop of).

10 Rep. 61. b. cites S.C. —Ley, 72. Yelverton J. said, he remembered the case of Boulton v. the Bishop of Chichester, upon which he collected that the bishop had usually granted to 2 counsellors at law 40 s. a year to each, where-

as now he granted 4 l. a year to one, though this be not in diminution of the revenue, nor more chargeable to the successor, yet because it is a great prejudice to him, in another degree it is void; for he cannot by any intendment be so well advised by one as by two; but if the bishop had granted a counsellor 40 s. and by the last clause had granted to him another 40 s. it is void for the last, and good for the first; and this difference he grounded upon 2 E. 2. * Feoffments, 94. But Boulton in this case did not prevail, because he did not aver that it was the ancient fee.

* [371]

13. The dean and chapter of Fernes in Ireland consisted of 11 persons and the dean; and 3 of these, with the commissary or proctor of the dean, confirm, &c. and afterwards 3 other of the prebendaries subscribed their names to the confirmation at several days, and the lease was held void because the dean could not make a substitute, and the major part of the corporation ought to be consenting to this, and that simul & semel, and not scatteringly; but they are not confined to the chapter-house, but they may assemble and do their acts elsewhere. Dav. 47, 48. Pasch. 5 Jac. B. R. The Dean and Chapter of Fernes's case.

Palm. 457. S. C. adjudged; but says it was resolved by all, that a mere commendatory cannot confirm. — Lat. 233. S. C. in totidem verbis. — Noy, 93. S. C. adjudged accordingly as to the principal point.

14. If a dean of Y. be made a bishop of L. and by a dispensation is continued dean as before, with a power *facere omnia quæ ad decanum pertinent* in tam amplis modo & forma, as if he was not promoted to the said bishoprick *non obstante any statute, canon general or local* to the contrary, and afterwards is made bishop of B. but before his confirmation the king makes another dispensation to retain the deanry as before, and mesne between the two dispensations the bishop of Y. made a lease for 21 years, which the dean confirmed. Per tot. Cur. the dispensations continued him dean as before per vim prioris tituli to all purposes, so that he may confirm, make leases, or do any act as dean, as if he never had been bishop. And all agreed that the 2d dispensation on his election to B. was made in time convenient, and that he continued dean by force thereof. But Jones J. held that had he been a mere commendatory dean only, the confirmation had not been good, to which Hide assented, but Doderidge seemed

e contra,

Confirmation.

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contra, and Whitlock J. said nothing. Jo. 158. Trin. 3 Car. — Watf. B. R. Evans v. Askwith.

— Watf.
Comp. In-
cumb. 8vo.

845. cap. 44. has a quære, who confirms bishop's grants and leases, where there is a mere commendatory dean, if not the clergy of the diocese, as in case where there is no dean and chapter.

(I) *By the Bishop, Dean and Chapter, what shall be said a good Confirmation.*

[1. 8 E. 1. **R** Otulo Cartarum. M. 8. Part. 46. *release of the bishop of London ex assensu & consensu Decani totius Capituli.*]

2. C. a prebendary of the cathedral church of Chichester, made lease by indenture, that he with the assent of R. bishop of Chichester, and of the Dean and Chapter of the same church, without naming the names of the dean, and the deed concluded thus; viz. In witness whereof the said parties to these present indentures have interchangeably set their seals, and the seal and name of the prebendary, and the seal of the bishop and the chapter was put to it; quære, if without any words of confirmation or assent mentioned by them, if this be a good lease to bind the successor. D. 106. b. pl. 21. 1 & 2 P. & M. Champion's case.

(K) *Confirmation of the Grant of the Dean.* [372] *What shall be a good Confirmation.*

[1. **I** F a dean leases any of his possessions, of which he is sole seised, with the assent of the chapter, this is a good confirmation, because the dean only had the estate. D. 29 H. 8. 40. b. 72. and the writ de fine assensu Capituli will prove, that there needs but one assent.]

D. 40. b.
pl. 1. Cha-
sin's case,
S. C.

[2. **[So]** if a Dean is sole seised, and not with the Chapter, of certain possessions, and leases it by such words in the deed, *quod Decanus ex assensu totius Capituli dimisit*, and the seal of the Chapter is annexed to the deed; this is a good confirmation, for it is a good assent. D. 29 H. 8. 40. b. 72.]

D. 40. b.
pl. 1. Cha-
sin's case.
See (O)
pl. 1.

[3. **So** if an abbot leases with the assent of the covent, and annexes their seal to the deed, this is a good confirmation, because the abbot hath all the estate, and there requires only the assent of the covent, which passes nothing. D. 29 H. 8. 40. 72.]

S. P. by
Ayliffe and
Clench J.
for the
monks and
friars being

dead persons in law, cannot be parties to the lease. 4 Le. 11. pl. 44. Trin. 26 Eliz. B. R. obiter in Clark's case. — S. P. obiter D. 40. b. Hill. 29. H. 8. pl. 1. — S. P. Br. Faits, pl. 45. cites 14 H. 6. 16. See (O) pl. 1. and the notes there.

[4. **[But]** if a dean and chapter are jointly seised, and the dean leases with the assent of the chapter, and annexes the seal of the chapter to the deed, this is void, and shall not bind the chapter, because they have an estate in them, as well as the dean hath in him,

D. 40. b.
pl. 1. Cha-
sin's case. —
S. P. be-
cause the
chapter are

parcel of the him, and may make a grant. D. 29 H. 8. 40. b. 72. Pasch. 10 Jac^o corporation, B. between TOMLINSON AND CROKE, agreed.]
and seised with the dean, and shall implead and be impleaded with him. Br. Faits, pl. 45. cites 14 H. 6. 16.

D. 273. b.
pl. 38.
Pasch. 10
Eliz. Wal-
rond v. Pol-
lard. See
(R) pl. 2.
S. C.

[5. The dean of Wells may pass his possessions with the assent of the chapter without any confirmation of the bishop, and after this deanry is surrendered and dissolved, and this dissolution confirmed by parliament, and a new deanry executed by the act, and the nomination by letters patents of the new dean and his successors given to the king and his successors; and it is enacted also, that the new dean, and his successors, may grant, demise, and depart with their possessions, in the same manner and form as the ancient deans might and used to do; in this case there needs no confirmation from the bishop of the grant made by the new dean, because his confirmation was not necessary to the grants of the old dean; nor is the confirmation of the king of the grant of the new dean necessary, because this is not a mere donative, but is made of the same nature as the old dean was. D. 10 Eliz. 273. 37. per Curiam.]

6. Dean seised in right of himself and his chapter makes lease for years. Chapter by themselves confirm it; it is not good, because their deeds being severed are to no purpose, it being a body entire, otherwise if after the lease they both confirm, because it amounts to a new lease. D. 40. b. 1. in Marg. cites 14 H. 6. 16. [But I do not observe this very point in that case in the Year-book.]

7. An archdeacon having a parsonage appertaining to his archdeaconry, made a lease of the parsonage before the statute 13 Eliz. for forty years, and which was confirmed after the statute, adjudged a good lease and confirmation for the forty years. Mo. 459. pl. 636. Mich. 38 & 39 Eliz. Arkingfall v. Denny.

[373] (L) Confirmations by Parson, Patron, and Ordinary.
What shall be said sufficient.

Fol. 479.

Cro. E. 587.
pl. 18.
Mich. 39 &
40 Eliz.
B. R. Herbert v.
Munday,
S. P. and
seems to
have been
upon the
same parson-
age, and
Popham
said, that
this was in
his time a
great ques-
tion, but
that it had
been in two
or three

[1.] IF the bishop of Sarum be patron of the church presentative of S. which lies within his diocese, and this is the body of a prebendary in the church of Sarum, and the bishop of Sarum is patron also of the church of D. which is also presentative, and this lies in the diocese of the bishop of Winton; and after the church of D. is annexed and united lawfully, by the assent of the bishops, deans and chapters of both dioceses, to the prebend of S. and after the bishop of Sarum collates J. S. to the said prebend, which now by the union consists of both churches, and installs him in the cathedral of the church of Sarum; and after the prebendary makes a lease for years before the statute of the 13 Eliz. and not warrantable by the statute of the 32 H. 8. and this is confirmed by the bishop, dean and chapter of Sarum, and not by the bishop of Winton; yet this is a good confirmation; for by the union the bishop of Winton hath annexed it to the prebend of S. and so hath ousted himself of his power of confirmation as ordinary; for after the union, the prebendary is invested

vested in both churches by his instalment without any other presentation, admission, institution, or induction, in the church of D. or S. Pasch. 10 Jac. B. R. between LEIGH AND HELLIER; resolved per Curiam, upon evidence upon a trial at bar for part of the possessions of the church of Husband-Tarant, in the county of Southampton, which was annexed to the prebend of Burbage in the county of Wilts, this being a prebend in the cathedral church of Sarum.]

cases since resolved, that it is well enough; and to this all the other justices agreed.

2. A parson made a lease for years, P. who was the patron in the reversion before the statute 13 Eliz. confirmed it, and after the statute, viz. the 14 Eliz. the ordinary confirmed it, and 23 Eliz. he which had the patronage for life confirmed it. It was the opinion of the justices, that all the confirmations by the ordinary and patrons were good; for the statute speaks of alienations by incumbents, but doth not make void confirmations made before the statute. Cro. E. 18. pl. 5. Pasch. 25 Eliz. C. B. Higgins v. Grant.

3. A prebendary of Salisbury, anno 4 E. 6. made a lease to P. for 99 years of the rectories, and of K. and Y. in com. Devon, to commence after a lease then in being, which last lease was confirmed by the bishop of Sarum and dean and chapter there and enjoyed accordingly. The court held this a good lease, though not confirmed by the bishop of Exeter in whose diocese these rectories were; for though they are not within the diocese of Salisbury, yet because by grant of H. 2. and of the bishop of Exeter, they are annexed to the canonry of Salisbury and made parcel of the prebend there, therefore though they are inducted by the bishop of Exeter, yet they are instituted by the bishop of Salisbury, and take an oath of canonical obedience to him, and lapse, &c. shall not incur to the bishop of Exeter. Sid. 75. pl. 6. Pasch. 14 Car. 2. B. R. Gie v. Rider.

2 Keb. 280. pl. 80. Jay v. Rider, S. C. says it was doubted whether the lease confirmed by dean and chapter and bishop, who is patron of lands lying in another diocese, whereof D. is ordinary, be good without

confirmation by D. but that afterwards it was ruled to be good.

4. If there be a composition confirmed between a parson and his parishioner, by which the parishioner is to pay 5 l. in lieu of his tithes for 10 years, and afterwards another composition is made, whereby the parishioner agrees to pay 6 l. for the same 10 years; this 2d is good without a confirmation, because it is an enlargement of the former, and more * for the parson's advantage than the first was. Arg. Hard. 385. Mich. 16 Car. 2. in case of Ingoldby v. Wivell and Ullithorne.

But by the judgment in the principal case it seems, that such second composition will not affect the successors of the parson, See ibid. 387.

and therefore the parishioner not bound by it.

* [374]

(M) Confirmation by the *Patron* and Ordinary.
Patron.Who shall be *sufficient* to make it.

* Br. Dean and Chapter, &c. pl. 6. cites S. C. that president or commissary of [1.] If a *Dean and Chapter* are *patron*, a confirmation by the president or *commissary* (who is a deputy) is not good without the confirmation of the dean, because the president can do nothing to charge the church. * 11 H. 4. 84. b. Davis, 1. 48. b. [47. b.]

dean have authority to hear and determine spiritual or other causes, but not to seal a confirmation for the dean or the chapter in the name of the dean and chapter, so as to bind him and his successors. — The power of the commissary is only to discuss causes, and not to seal deeds; and though in this case the deed was sealed by the chapter as well as the dean's commissary, it was held not good to bind the successor. Br. Corporations, pl. 17. cites S. C. but Brooke adds a *quære*, if there was a custom that the commissary seal for the dean. — A dean cannot make a deputy to confirm leases; per Noy. Palm. 461. — Lat. 35. S. P. accordingly. — Ibid. 237. S. P.

Cro. J. 458. [2. If a *bishop* be *patron* of a *prebendary*, and he confirms a lease
pl. 5. Smith made by the *prebend*, this is not good without the confirmation of
v. Bole, the dean and chapter; for this patronage is part of the possessions
S. C. but of the bishopric, of which he cannot bind his successor without
S. P. does the dean and chapter. P. & Tr. 15 Jac. B. R. between SMITH
not appear. — 3 Bulst. AND BOWLES, this was so agreed.]
— 300. S. C.

which see at
pl. 3. in the notes there. — Co. Litt. 300. b. S. P. of an advowson, that if he be a patron he cannot confirm alone, but the dean and chapter must confirm also for the reason given in Roll. — See pl. 3. and the notes there. — See (P) pl. 1, 2. S. C.

3 Bulst. [3. But it seems that such a confirmation made by the bishop
— 300. S. C. shall bind the bishop himself during his time, and all those who come
says it was under him; for the confirmation of the dean and chapter is re-
urged and quisite, that the bishop may not prejudice his successor. Pasch.
agreed by all & Trin. 15 Jac. SMITH AND BOWLES it was a question.]
that this confirma-

tion by the archbishop patron, without the dean and chapter, is good, and shall bind the successor; and for this was cited 33 H. 8. Brook's Cases, fol. 46. pl. 202. Pl. C. 528. in case of Hare v. Brickley, and 19 Eliz. D. 357. — Cro. J. 458. pl. 5. S. C. but S. P. does not appear. — But Br. N. C. fol. 46. pl. 202. is viz. if a *bishop* be *patron*, and the *parson* makes a lease, or grant by deed, there the *bishop* patron and the *ordinary*, and the dean and chapter ought to confirm, if the grant or lease shall be sure. *Contra* where a *layman* is *patron* in fee, and he and the *ordinary* confirm, this suffices without the dean and chapter. For in the first case the *bishop* patron has interest in the inheritance to the bishopric, but on the other case he has only a judicial power, therefore it suffices that he who has the power at the time, &c. confirm; for this is a judicial act, but in the other case it binds the inheritance, which he has in jure ecclesie, which he cannot do against his successor, without confirmation by the dean and chapter. — Br. Confirmation, pl. 1. cites S. C. in totidem verbis. — Br. Leases, pl. 64. cites S. C. and S. P. accordingly, and for the same reasons. — Br. Charge, pl. 40. cites 11 H. 6. 9. S. P. and cites 33 H. 8. accordingly.

The case in Dyer is, viz. A *parson* of a church made a lease for 40 years, the *bishop* of London being *patron* and *ordinary*, confirmed it without the dean and chapter; the incumbent died, the *bishop* collated another, who made a new lease which is well confirmed; the *bishop* is translated; the resolution of the justices was certified to the counsel, that the first lease stood good, and not the second, during both lives of the *bishop* and successor incumbent, who found the church charged. D. 367. pl. 42. Pasch. 19 Elis. Anon. — S. C. cited Le. 235. in pl. 317. — S. P. admitted, as to binding the *bishop* during his own time. Co. Litt. 300. b.

† [375]

Ibid. Marg. says it was adjudged in

† 4. A *bishop* seised of land in right of his bishopric made lease for years, *lessee* entered, and afterwards *lessor* by indenture *dedit*, *concessit*

concessit & confirmavit the land to the lessee in fee, rendering to the bishop and his successors 10 l. rent, with a letter of attorney to make livery, and delivered the deed himself to the lessee, and livery was made accordingly; and all this was confirmed by the dean and chapter in the life of the bishop, the dean being absent in remotis, but the president of the dean was present whom the dean had constituted by parol only locum tenentem suum, & tradidit claves suas una cum auctoritate vocis & assensus decani, and this was entered in the register according to ancient custom. Afterwards the same bishop also granted and released the same rent to the lessee and his heirs, and this also confirmed as above, both dean and president being absent, but the substitute or deputy of the president being only present; and whether the successor might avoid these alienations or either of them was moved before the justices at Serjeant's-inn by command of the Ld. Chancellor. D. 145. b. pl. 65. Pasch. 3 & 4 P. & M. Litchfield (Bishop) v. Fisher.

the case of the dean and chapter of Fernes, Dav. Rep. 47. that the substitute cannot charge the possession, and so the quære in Dyer resolved. — Dav. Rep. 47. b. in S. C. accordingly. — Palm. 46. cites Dav. Rep. 47. that if commissary

confirms the lease of the bishop, it is good; whereupon Jones J. said that Davis's Reports are not canonical; and Doderidge J. added, that they were made for the meridian of Ireland only, and said that D. 145. it is a quære. — Ibid. 479. S. C. cited accordingly by Doderidge. — Lat. 238. by Jones and Doderidge, S. P.

5. A. parson of D. is patron of the church of S. as belonging to his church, and presents B. who by consent of A. and of the ordinary grants a rent-charge out of the glebe; this is not good to make the rent-charge perpetual, without the assent of the patron of A. no more than the assent of the bishop who is patron without the dean and chapter, or no more than the assent of the patron being tenant in tail or for life, as Littleton says. Co. Litt. 300. b.

(N) Who in respect of his Estate [may confirm a Grant. Things Spiritual.]

[1.] *If baron and feme are patrons in the right of the feme, if they confirm by deed the lease of the parson, this is not good against the feme and her heirs, but only during coverture; for the deed of the feme is void. Vide for this, D. 3, 4. Ma. 133.1.]*

D. 133. pl. 1. is that the baron and feme and ordinary confirmed

the lease, and that the incumbent lessor was deprived for marriage, and the baron and his wife having granted the next avoidance before the deprivation, the grantee presented his clerk, who entered upon the lessee to avoid the lease. The reporter says, quære; because it seems the entry congeable. But nothing is said as to binding the feme and her heirs during the coverture only.

[2. *If tenant in tail of an advowson confirms a lease made by the parson; this shall not bind the presentee of the issue after the death of the confirmer, but he shall avoid it. My Reports, 14 Jac. MAUND AGAINST FRENCH.*]

Fol. 480. Roll. Rep. 361. pl. 14. S. C. & S. P.

agreed by Coke Ch. J. and Doderidge. — 2 Roll. Rep. 8. S. C. adjournatur. — Bridgm. 92. to 100. Mande v. French, S. C. argued, and it was insisted among other things, that the confirmation was utterly defeated and avoided by the remitter. — And Pasch. 16 Jac. without any argument by the judges, it was agreed for the plaintiff, and thereupon judgment was given accordingly for the plaintiff. — Le. 234. in pl. 317. Coke Arg. cites 31 E. 3. Grants, 61. that such act of the patron shall bind only according to the estate of the patron, as if tenant in tail confirm the same it shall not bind the presentee of the issue. — Litt. f. 528. and Co. Litt. 300. b. S. P. But if the patron is tenant in tail, and discontinues the estate tail, the lease shall stand good during the discontinuance; or if the estate be barred, it shall stand good for ever.

[3. [So] if the *chaplain of a chantery or free chapel, which is a donative, makes a lease for years before the 32 H. 8. and the patron of the chapel being seised of the patronage in tail confirms it; this shall not bind the chaplain of the issue.* D. 8 El. 252. 95. admitted. But there the question was, the patronage came to the king by the statute of chanteries, before any gift by the issue and donor and his heirs excepted * [saving the leases and interests of all other, except the patrons and donors, and their heirs], and yet it was held the king should avoid it; but after it appeared, that the donor had levied a fine after the confirmation, by which the issue was barred to avoid it, and then the king might not avoid it.]

• The words in the crotchet are not in the original, but seem necessary.

An usurper, who usurps before installation or induction, or presentation, where another abbot or parson is rightfully in possession, or if one enters and occupies in time of vacation without any election or presentation, the deed of such is not good. Br. Non est factum, pl. 3. cites 9 H. 6. 32.

[4. If the *incumbent of an usurper makes a grant, and this is confirmed by the usurper and ordinary; and after in a quare impedit the true patron recovers, and removes the incumbent. The grant by this is defeated, because here was never any parson and patron in right.* 9 Hen. 6. 33.]

Cro. C. 582. pl. 7. Plowden v. Oldford, S. C. and was in error of a judgment, C. B. and Jones and Barkley J. in B. R. (the Chief J. and Crooke being absent in chancery) gave rule for affirmance of the judgment. And this being reported to Bramston Ch. J. of

[5. If *A. be seised of an advowson in fee, which is full of B. the incumbent, and after A. grants the next avoidance to C. and after B. grants a lease of the rectory for years, and this is confirmed by A. and the ordinary before the statute of 13 Eliz. and after B. dies, and C. presents E. who is instituted and inducted, and enters into the rectory, and after dies, and A. presents F. who is instituted and inducted; F. shall hold this church discharged of the lease, because this lease was totally avoided by the entry of E. who came in by the presentation of C. which was not subject to the confirmation of A. the patron in fee; for E. by his institution and induction was seised of the fee in the right of his church, as fully as any could be.* Pasch. 16 Car. B. R. between SIR EDMUND PLOWDEN AND OLDFIELD, adjudged, per totam Curiam, in a writ of error upon such judgment in Banco, upon a special verdict for land, parcel of the rectory of l'Assam in the county of Southampton. Intratur in B. R. Mich. 15 Car. Rot. 86. and the judgment affirmed accordingly.]

B. R. and Littleton Ch. J. of C. B. and to Davenport Ch. B. and Crooke J. they all agreed to that judgment. And afterwards, on a motion for a further day to speak in arrest of judgment, the court denied it, and the judgment was affirmed.——Jo. 454. pl. 1. Oldfield v. Plowden, S. P. adjudged and affirmed.——7 Rep. 8. a. Mich. 28 and 29 Eliz. in the Earl of Bedford's case. S. P. obiter held accordingly, per Cur.——Hob. 7. pl. 15. Trin. 11 Jac. Spendlow v. Buiket, S. P. held accordingly, and cites 7 Rep. 8.——Co. Litt. 46. a. S. P.——S. P. as to the grant of an annuity by the incumbent. Per Brown J. Mo. 67. in pl. 180.

Ibid. Marg. pl. 5. cites Pasch. 41 Eliz. where patron granted the next avoidance to B. and the par-

6. *A. a parson made a lease for 40 years, which was confirmed by the treasurer of York cathedral, who was patron as in right of his treasurer'ship, and after the patron and the bishop of Winton, who was ordinary, confirmed the lease in the life of the lessor, and before the confirmation the treasurer granted the next avoidance to another pro illa vice. A. died. He that had the next avoidance presented B.*

B. who was admitted and inducted, and then the said treasurer, with assent of the bishop of York, and the dean and chapter, aliened the patronage in fee. The question was, whether the new incumbent shall avoid the residue of the term? Quære; and note, the alienation was after the death of the lessor; ideo quære bene. D. 72. b. pl. 5. Mich. 6 E. 6. Anon.

*dies, and B. presents C. he shall avoid this lease. — The patron of the church of D. grants the next avoidance to J. S. and afterwards, before the statute 13 Eliz. the parson, patron, and ordinary, make a lease for years rendering rent, and the parson dies, * and J. S. presents W. R. who is admitted, instituted, and inducted, and dies, such lease was avoided in toto absolutely, and therefore cannot stand against the second successor. Per Cur. 7 Rep. 8. a. Mich. 28 and 29 Eliz. in the Court of Wards, in the Earl of Bedford's case. — Co. Litt. 46. a. S. P. and because the last incumbent, who had the whole estate in him, avoided the lease, it shall not revive again.*

* [377]

7. A. seised of advowson in fee, grants to B. and his heirs, that at whatever time the church becomes void, that B. and his heirs shall nominate a clerk to A. and his heirs, and that A. and his heirs shall present him over to the ordinary; if the parson makes lease or grant of rent-charge, this ought to be confirmed by both, but in writ of annuity aid is only grantable of him that has the presentation, for this is in the right. Mo. 49. pl. 147. Pasch. 5 Eliz. Anon.

8. Parson makes a lease for years, which is confirmed by the ordinary and by one of the patrons (there being two patrons of this church). The parson dies; the ordinary collates by lapse; adjudged that this was well confirmed, and that the collatee shall not avoid this lease. D. 72. b. Marg. pl. 5. says, the case was long and well argued. Trin. 33 Eliz. B. R. Lancaster v. Lucas.

9. Recusant though disabled to present yet shall be patron to confirm the lease of the incumbent. Per Jones J. Arg. Jo. 22. Hill. 18 Jac. C. B.

Dal. 48. pl. 10. S. C. in totidem verbis.

S. C. argued, but adjourned for further argument. Le. 233. pl. 316. Mich. 32 & 33 Eliz.

(O) Confirmation by the Patron and Ordinary. *What Act [is sufficient.]*

[1.] If an abbot makes a deed by such words, *sciant presentes me abbatem* of such a place, *ex assensu conventus dedisse*, or *dimississe*. This is good, though the convent did not grant, but assent. 14 H. 6. 17.]

reason seems to be, that the convent are dead persons in law, and are not seised, nor shall they implead or be impeaded, but the abbot only. — See (K) pl. 3. S. P. and the notes there.

Br. Faits, pl. 45. cites 14 H. 6. 16. S. C. and Brooke says that the

[2. If the patron and ordinary give licence [by deed, as it seems to be intended] to the parson, to grant an annuity, &c. this is a sufficient confirmation by them. 7 H. 4. 16. the parson granting it accordingly.]

Grant made by a parson by leave of the patron and ordinary, is good to

charge the church, by which Rickhil awarded it good, and the defendant to answer over, quod nota bene. Br. Dean and Chapter, pl. 32. cites 7 H. 4. 15. — Co. Litt. 300. b. says it was held that a licence by patron and ordinary to the parson by deed, to grant a rent-charge out of the glebe is good, and that such grant shall bind the successor, though there be no confirmation subsequent. — Parson leases for years or charges the church, and the patron and ordinary confirm it, this shall bind the successor. Br.

Leases, pl. 64. cites 33 H. 8. — Bridgm. 94. Hill. 13 Jac. in the case of *Mande v. French*, it is said that the assent of the patron ought to be by deed, otherwise it cannot be good.

S. P. by Ayliff and Clench J. [3. * Lit. 144. If the *parson grants a rent with the assent of the patron and ordinary*, this is a good confirmation.]

admitted; for there the parson is the principal grantor, and the others have not any express interest in the land charged.

* Hobart says, that though Littleton seems to be of opinion that the parson has not the right of fee-simple, he expounds himself as to the bringing a writ of right [See Litt. f. 645. at the end], but otherwise the act of the parson is it which charges or gives; and it suffices that the patron or ordinary do either license or assent. Hob. 7. pl. 15.

[378]

† Br. Faits, pl. 28. cites S. C. that it is good by the second delivery, because it to take no effect by the first delivery; as where one grants a rent-charge out of the manor of C. and has nothing in it at the time, &c. and after he purchases the same manor, and then retakes the deed, and re-delivers it to the grantee, this is good.

[4. If the *confirmation be made and delivered before the grant of the parson*, this is no good confirmation, though the grant be after made by the parson. † 8 H. 6. 6. Vide Trin. 8 Jac. Scaccario.]

Br. Faits, pl. 28. cites S. C. — See the note at pl. 4. supra. [5. So in this case, if after the grant the confirmation be delivered again, yet it is no good confirmation, because by the first delivery it is a deed, and this second delivery will not amount to an assent, because the assent ought to be by deed. Contra 8 H. 6. 6. b. because the first delivery was void.]

[6. If the *patron accepts a lease for years from the parson*, this is not any confirmation by the patron. Co. 5. Newcomen, 15. admitted.]

5 Rep. 15. a. cites it as Trin. 30 Eliz. in the Exchequer, *HODGES v. NEWCOMEN*. — Lane, 38. Arg. cites S. C. that the acceptance of the patron is good enough to make a confirmation. [But it seems mistaken.]

† 5 Rep. 15. a. *HODGES v. NEWCOMEN*, S. C. 14 Jac. MAUND AGAINST FRENCH.]

& S. P. resolved. — Co. Litt. 301. b. 302. a. S. P. § S. P. by Coke and Doderidge. Roll. Rep. 361. pl. 12. in S. C.

But if the patron, after his taking such lease, takes the profits to the use of his son, being within age, this is not any confirmation of the lease; for though the assent of the patron be sufficient, yet it ought to be by deed, otherwise it cannot be good. Bridgm. 94. in case of *MANDE v. FRENCH*, in a long argument there, but non constat by whom.

8. A dean seized in the right of him and his chapter makes a lease for years, and the chapter by themselves confirm the said lease; this is not good; for their deeds being severed have no effect, because they are all but one intire body; but otherwise it is if after the lease they both confirm, because this amounts to a new lease. D. 40. b. Marg. pl. 1. and refers to 14 H. 6. 16. [b. 17. a. which is only a similar point.]

9. If a *parson makes a lease for years, and the patron and ordinary put their hands and seals to it*, this is a good lease to bind the successor. D. 40. b. Marg. pl. 1. cites it as adjudged 2 Jac, Banister's case.

Cr. C. 38. pl. 3. Trin. 2 Car. C. B. Banister's case, seems to be S. C. though S. P. does not appear there exactly, and it seems that (2 Jac. in D.) should be (2 Car.),

(P) Confirmation by the Bishop and Chapter.
In what Cases it is requisite.

[1.] IF a *prebendary* or *parson* leases parcel of his prebend or parsonage, and the *bishop* who is *patron* confirms it, yet this shall not bind the successor bishop, *without the confirmation of the dean and chapter*, because the patronage is parcel of the possessions of the bishopric. P. & Tr. 15 Jac. B. R. between * SMITH AND BOWLES agreed by the counsel at the bar. 33 H. 8. Brook, Leases Placito, 64. D. 19 Eliz. 357. admitted, 1, 2 Ma. 106. admitted. D. 5 Eliz. 221. 18. Com. 528. pleaded. So per 33 H. 8. [379] Brook, Confirmation, 21. 30.]

* See (M) pl. 2, 3. S. C. and the notes there.

[2. But this shall bind the bishop, and all those *prebendaries* who come under him. Pasch. & Trin. 15 Jac. B. R. between SMITH AND BOWLES clearly held by the better opinion, because the *confirmation of the dean* is required only, for that the *possessions* shall not be aliened in prejudice of the successor. D. 19 Eliz. 357.]

See (M) pl. 3. and the notes there.

[3. If a *prebendary* leases for years, and the *dean and chapter* confirm it *without the bishop*, this shall not bind the successor, because the bishop is patron and ordinary thereof, D. 36 H. 8. 61. Quære.]

Of common right the bishop is patron of all the prebends, be-

cause their possessions are derived from him. 3 Rep. 75. b. Mich. 40 & 41 Eliz. cites 25 Aff. 8. 17 E. 3. 40. 10 E. 3. 10. 50 E. 3. 16. — Per Coke, Cro, E. 79. pl. 40. Mich. 29 & 30 Eliz. S. P. as to the possessions, and cites 7 E. 3. 5. 30 E. 3. 26.

(Q) Confirmation by the Bishop, Dean, and Chapter.
In what Cases it is necessary.

[1.] IF an *appropriation* be made to an *abbot*, *patron* of the church, by the *assent of the king and bishop*, this is sufficient, *without the confirmation of the dean and chapter*, and this shall bind the successor bishop; for the bishop gives nothing by his assent, nor hath any right as patron, but only as ordinary. Contra, 46 Aff. 4. Brooke, Dean and Chapter, 18.]

Br. Appropriation, pl. 4. cites S. C. that in assise of daren presentment, an appropriation of

the advowson was pleaded in the time of H. 3. by licence of the king, and of the bishop, and dean and chapter, and of the pope, and he himself who appropriated was patron, as he ought always to be upon appropriation; and Brooke says, that so it seems here that the licence of the bishop is not but for his own time without the dean and chapter, and that concordat 19 E. 3. tit. Judgment, in Fitzh. 124.

[2. If a *parson* grants a rent, the *confirmation of the patron and bishop* is sufficient *without the dean and chapter*, and shall be good against the successor bishop, for he makes this confirmation but as ordinary, and the bishop only is compleat ordinary. Ergo.]

3. *Treasurer of a cathedral church* brought assise of his possession severed from the chapter; release of the dean and chapter is no plea;

A lease by treasurer of a church

shall bind his successor; per Fenner J. said to have been so adjudged. E. 350.

plea; for it is his several right, and that he cannot *make lease* but for his own time without confirmation of the dean and chapter. Br. Dean, &c. pl. 15. cites 17 Aff. 29.]

Cro. E. 350. pl. 27. — Lev. 112. in a nota, cites it as so said by Fenner in Cro.

Adjudged on a special verdict, that a lease by a prebendary is good; for he is not excepted by the stat. 32

4. A *prebendary* made a *lease* for years of *part of his prebend*, and this was *confirmed by the dean and chapter*. It seemed to divers, that this should not bind the successor without the assent of the bishop, because the bishop is patron and ordinary of every prebend. But the reporter says, *quære*; for the common usage is to the contrary. D. 61. b. pl. 30. Pasch. 38 H. 8. Anon.

H. 8. but only parsons and vicars, and being not excepted, he is as bishops. And Popham said, that in Dr. DALL'S CASE, for a house near Paul's it was so adjudged, and that it had been so twice adjudged in his experience. Cro. E. 350. pl. 27. Mich. 36 & 37 Eliz. B. R. Watkinson v. * Man. — S. C. cited in a nota, Lev. 112. but cites Co. Litt. 300. b. [301. b.] where prebendary is taken as parson or vicar not to have all the fee in him.

* [380]

Sid. 158. pl. 17. Bisco v. Holt, S. C. held accordingly. — Keb. 576. pl. 37. Bill v. Holt, S. C. and per Cur. this being an impropriation cannot be annexed to the office of chancellor, but only in right of his prebendary, and therefore his lease is good against the successor without confirmation of the dean and chapter.

5. A *lease by chancellor of a cathedral church* shall bind without confirmation; per tot. Cur. for he is a prebendary and more; for he has a prebend, and besides this a dignity, and is seised in fee in right of his church within the words of the stat. 32 H. 8. and they would not permit it to be found specially, though desired by the attorney-general; for they said they would not have it made a doubt. Lev. 112. Mich. 15 Car. 2. B. R. Bisco, Lessor of Strode, v. Holt.

(R) Confirmations of Grants of *Donatives*.

See Co. Litt. 301. a. b. the notes upon Litt. f. 530. that at the common law the charge of the chaplain and patron had been good.

[1. **T**HE grants made by *donatives* ought to be confirmed by the patrons of them, or otherwise they are not good against their successors. D. 10 Eliz. 273.]

See (K) pl. 3. S. C.

[2. The *deanry of Wells* was surrendered and dissolved, and this dissolution confirmed by parliament, and a new dean erected by the act, and the nomination of the new dean and his successors by letters patent given to the king and his successors; and it is further enacted, that they shall pass their possessions in the same manner as the ancient deans might; the new dean may (†) grant his possessions as the old dean might with the assent of the chapter, without the confirmation of the king, though he comes in by the letters patents of the king, for the special words of the statute. D. 10 Eliz. 273. 37.]

† Fol. 482.

(S) *Who may confirm in respect of his Estate.*

[1. *NONE* can confirm *unless he hath a right at the time.* Per Markham, in the
19 H. 6. 62.]

OF EDINGTON'S CASE, quod nemo negavit; and therefore it seems that confirmation made by the son, without warranty in the time of the father, is not good against the son after the death of the father. Br. Confirmation, pl. 10. cites S. C.

[2. If tenant in tail of an advowson and his son and heir apparent join in a grant of the next avoidance, and after tenant in tail dies, his son shall avoid it; for this can be no confirmation by him, inasmuch as he had nothing in it at the time of the grant. M. 12 Jac. B. between WIVELL AND SCROOPE, plaintiffs, AND EUBANK AND TOPSON, defendants, adjudged.]

neither in possession nor right, nor in actual possibility at the time of the grant; * hereupon a writ of error was brought, but assigned only in a discontinuance; for the judgment was given on a demurrer. — Brownl. 165. Wivel v. the Bishop of Chester, S. C. adjudged that the grant is void.

* [381]

3. In *assise*, where the father granted a rent-charge for life, and the son confirmed it, and the father died, and the grantee brought *assise* of the rent, and the issue was taken upon the *seisin* of the son, at the time of the confirmation made; and so it seems that he who confirms without warranty, where he had nothing at the time of the confirmation made, as the son in the life of the father, &c. that in this case the confirmation shall not bind the son after the death of the father, but he may say that he had nothing at the time of the confirmation. Br. Confirmation, pl. 14. cites 14 Aff. 14.

4. Where my entry is lawful there my confirmation is good. Br. Confirmation, pl. 32. cites 11 H. 7. 28.

5. As if my disseisor grants a rent-charge, and I confirm it, this is good. Ibid.

6. And if I infeoff another upon condition, and after the condition is broken, and I confirm his estate, this is a good confirmation. Ibid.

7. But if the confirmation had been made before the condition had been broken, nihil operatur. Ibid.

b. pl. 73. Casus incerti temporis. — S. C. cited Arg. 1 Rep. 146. b. 147. a. b.

8. *Non valet confirmatio nisi ille, qui confirmat, sit in possessione rei, vel juris*, unde fieri debet confirmatio. Co. Litt. 295. b.

9. If a man grants a rent-charge out of his land to another for term of his life, and after he confirms his estate in the said rent, to have and to hold to him in fee tail or in fee simple, this confirmation is void as to enlarge his estate, because he that confirmeth has not any reversion in the rent. Litt. f. 548.

ed and a rent in fee; but says it is to be observed that Littleton intends his deed of confirmation not to contain any clause of distress; for otherwise as to the confirmation the deed is void, but the clause of distress amounts to a new grant.

Hob. 45. pl. 48. Wivel's case. S. C. adjudged; because the son had nothing in the advowson,

S. C. cited Arg. 1 Rep. 147. a. and ibid. per Cur. 148. a. — Co. Litt. 300. a. S. P. — Kelw. 103. a. pl. 3. S. P. argued; and ibid. 121.

Co. Litt. 308. a. says that the diversity is apparent between a rent newly created

10. But

Co. Litt.
308. b. says
it is to be
observed
that Little-
ton here puts
an attorn-
ment, be-
cause it is
requisite ;
but to the

confirmation of the grantee of the rent to enlarge his estate, there is none necessary, and therefore he puts none.

10. But if a man be seised in fee of a rent-service or rent-charge, and he grants the rent to another for life, and the tenant attorns, and after he confirms the estate of the grantee in fee tail, or in fee simple, this confirmation is good, so as to enlarge his estate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reversion of the rent. Litt. f. 549.

Jo. 393,
394. pl. 3.
Trin. 13
Car. Dixie
v. Beau-
mont, the
S. C. be-
tween other
parties,
Barkley ar-
gued with
the resolu-
tion report-
ed, and
Crooke e
contra, and
on motion
by the court
before the
argument of
Jones and
the Ch. Jus-
tice, the
matter was
compromif-

ed, and so their argument spared ; but Jones held against the resolution ; for admitting that the feme was tenant in tail, and her issues barred by fine of the baron, and that a descendible quality cannot be given to the said estate tail, yet the person of the feme was not disabled by the stat. 4 H. 7. and 32 H. 8. but only her estate, and consequently she, as well as a stranger, may take a new estate in remainder, which shall be descendible to her issues, and her issues shall make title upon this gift in remainder, and as issue of the donee in remainder, and not by the ancient and first estate tail which was barred by the fine, and he thought this a plain case.——Cro. C. 476. pl. 5. Baker v. Willis, S. C. according to Jo.

11. If baron and feme are tenants in special tail, remainder to the baron and his heirs, and the baron levies a fine with proclamations, to the use of J. S. and his heirs, and dies, and the wife enters ; and J. S. reciting the gift in tail, and that the wife was seised in tail by force thereof, confirms her estate habend' to her and the heirs of the body of her late husband and self, &c. the confirmation is void, & nihil operatur. For if the remainder had been in a stranger, and the wife enters, nothing is left in the conusee but a possibility which does not pass by the confirmation, and though the conusee has the remainder by the fine, nothing can be extracted out of the fee by the confirmation ; for the old estate tail is barred as to the issues, and cannot descend, but the feme is seised of the intire old estate, and no new estate is created by the confirmation, but only the old estate confirmed, and consequently cannot descend ; nor can a confirmation add a descendible quality to * him who is disabled to take by descent. Adjudged. 9 Co. 138. &c. Pasch. 10 Jac. in the Court of Wards. Beaumont's case.

(T) Confirmation by way of *Enlargement*. *Who may confirm in respect of his Estate.*
[In Temporal Matters.]

[1. **H**E that hath *but a right in reversion* cannot enlarge the estate of the lessee. 3 H. 4. 10.]

2. If the *disseisee* and a *stranger* disseise the *heir of the disseisor*, and the *disseisee* confirms the estate of his *companion*, this shall not extinguish his right that was suspended; so as if the *heir of the disseisor* re-enters, the right of the *disseisee* is revived, Co. Litt. 298. b.

3. So it is if the *grantee of a rent-charge* and an *estranger* disseises the *tenant of the land*, and the *grantee* confirms the estate of his *companion*, the *tenant of the land* re-enters, the rent is revived; for the confirmation extended to the rent suspended; otherwise it is of a *release* in both cases. Co. Litt. 298. b.

(U) *To whom* it may be.
[In Temporal or Spiritual Matters.]

[1. **A** Confirmation to *lessee for life*, and a *stranger*, to have for their lives, is void; for there is *no privity*. Contra 18 E. 3. 19. b. admitted.]

But where lessor covenanted with lessee for years, that

he and a stranger should have for life; and there because the stranger could not take in possession, the justices made such construction, that it should enure as a confirmation of the lessee's estate, and remainder over to the stranger for the benefit of the stranger. Palm. 31. cites it to have been resolved 24 Elis. at Hertford.

2. If a man leases to *J. N.* for term of years, and the lessor confirms to the lessee and his *feme* for term of life, they have franktenement by this. Br. Confirmation, pl. 26. cites 8 Aff. 20. per Wilby.

3. And by 2 E. 3. if the *baron* be tenant by *elegit*, and the *conusor* confirms to him and his *feme* for term of life, that they have franktenement. Contra 40 E. 3. 23. and 18 Aff. 3.

4. One made a lease to a man for term of his life, and took *feme*, and the lessor granted and confirmed to the *baron* and *feme* for their lives; and per Cur. this shall not extend to the *feme*, because she had nothing in the land at the time of the confirmation. Br. Confirmation, pl. 3. cites 40 E. 3. 23. [383]

5. A *chaplain* enters into a *benefice* where the king is intitled to present, and the king confirms his estate; this is a good bar in *quare impedit* brought by the king, if the chaplain be in as *incumbent*; but contra if he be in as *intruder* in the life-time of the other *incumbent*. Br. Confirmation, pl. 6. cites 7 H. 4. 30.

Br. Quare Impedit, pl. 47. cites S. C.

6. But per Skrene, if he enters as *spoliator* [intruder], and after the *incumbent* upon whom he enters dies, and now the king confirms, this is good. Quare inde. Ibid.

7. An

Le. 47. pl. 61. Anon. S. C. Anderson Ch. J. thought the confirmation good, but the point was not determined —
 7. An alien born purchased lands in fee, and before office found the queen, by letters patents, made him a denizen, and confirmed his estate. The question was, whether the confirmation was good? Anderson thought it good, but Rhodes e contra; and Shuttleworth being afterwards asked the question by divers barristers, he said his opinion was, that the lands were not in the queen before office found, and that therefore the confirmation is good. Goldsb. 29. pl. 4. Mich. 28 & 29 Eliz. Anon.
 4 Le. 82. pl. 175. S. C. in totidem verbis.

8. A. leased to B. at will, and afterwards leased to him for years, remainder to J. S. in fee. This is good, though no livery be made; for possession countervails livery. D. 269. b. 20. in Marg. cites 38 Eliz. C. B. Cooper v. Callambil.

9. Non valet confirmatio, nisi ille, cui confirmatio fit, sit in possessione. Co. Litt. 295. b.

But if the lease be to commence at Michaelmas next, the confirmation is void, because the termor has only an interesse termini, and no estate in him whereupon a confirmation may enure. Co. Litt. 296. b.

2 Keb. 432. pl. 68. Dunalston v. Whitchcott, S. C. the court held the feoffment with future conveyances sufficient, and both living together the entry shall be intended, and need not be specially proved, whereupon the plaintiff was nonsuited.
 11. A seised of land grants and infeoffs B. of the premises by deed sealed and delivered, but no livery and seisin. About a year after A. grants and confirms the premises to B. at which time, and before, A. and B. lived together in the house upon it. A. kept house, and paid parish duties. Per Cur. such living together in the house is sufficient entry and possession to enable B. to take confirmation; for the law will adjudge the possession in him that had the right, which was B. unless it had been proved that A. had determined his will after the feoffment, and before the confirmation. Sid. 385. pl. 16. Mich. 20 Car. 2. B. R. Lord Kinoul v. Whitchcott.

(U. 2) At what Time it may be. [In Temporal or Spiritual Matters.]

1. Confirmation bore date before the date of the deed of grant, and yet good, because it was averred to be primo deliberatum after the first deed; quod nota. Br. Confirmation, pl. 25. cites 1 H. 6. 8.

[384] 2. If a parson grants an annuity, and resigns, and the patron and ordinary confirms it, the annuity is determined, and the confirmation comes too late. Br. Annuity, pl. 26. cites 21 H. 7. 1. per Butler.

If a parson charges his glebe, the confirmation must be in the life, and during the incumbency of the parson, and so in the life of the bishop, or of any other sole corporation. Co. Litt. 301. a.

Co. Litt. 296. a. S. P. but with a
 3. If tenant for life leases to A. for years, and afterwards leases the same lands to B. for years, and he in reversion confirms the last lease,

lease, and afterwards confirms the first lease, yet this confirmation does not make it effectual, because B. the second lessee had an interest before by the confirmation of him in the reversion; per Dyer, Weston, and Carus; but Brown seemed e contra. D. 67. in pl. 180. Trin. 6 Eliz.

little variation, viz. lessee for life made a lease for 30 years to A. and afterwards

lessor and lessee for life joined in a lease for 60 years to B. which lease for 60 years lessor confirmed, and afterwards he confirmed the lease for 30 years, and then within the 30 years lessee for life died. It was adjudged, that the lease to A. for 30 years was determined by the death of lessee for life, and that B. might enter; for though B.'s lease was later in time, yet it was of more force in law; because the lessor, who had power to confirm which he pleased, did confirm the second lease first. Cites it as in the time of Q. Elis. Uwell v. Lodge.

4. If a *bishop makes a lease on the 2d of May*, and the *dean and chapter confirms it on the 1st of May*, this lease is good after the bishop's death; per Catlin and Southcote. But Wray asked, how a lease can be confirmed before it is made? To which Catlin and Southcote answered, that the *assent before* is a good confirmation after. Ow. 33. Hill. 8 Eliz. Anon.

Confirmation of a bishop's lease by dean and chapter may be before the lease as well as after, because the

dean and chapter have no interest in the land, but only a power to assent, and an assent passes no interest any more than an attornment; per Manwood Ch. B. Lane, 64. Trin. 7 Jac. in Sir Edward Dimmock's case.

5. Assent of dean and chapter to a *lease in reversion made by the bishop* is good either before or after attornment, but in case of a translation of the bishop to another bishopric attornment after is void. 3 Le. 17. pl. 40. Mich. 14 Eliz. Anon.

Ibid. 61. pl. 90. S. C. in totidem verbis. — 4 Le. 23. pl. 73. The

Bishop of Rochester's case, S. C. in totidem verbis.

6. *Prebendary grants a lease; the bishop, who was patron as well as ordinary, grants the next avoidance* of the prebend to J. S. The dean and chapter confirm the grant. Then the bishop and the dean and chapter confirmed the lease. This confirmation is too late, and not good against a successor presented by the grantee of the next avoidance. Hob. 7. pl. 15. Trin. 11 Jac. Spendlows v. Burket.

7. There is a *diversity* between a confirmation of an estate and a confirmation of a deed: for if the *disseisor makes a charter of feoffment to A. with a letter of attorney, and before livery the disseisee confirms the estate of A. or the deed made to A.* this is clearly void though livery be made after. Co. Litt. 301. a.

8. The like law is of a confirmation of a deed of grant of a reversion before attornment. In the same manner it is if a *bishop at the common law had granted lands to the king in fee by deed*, and the dean and chapter by their deed confirm the deed of the bishop, and after the deed of the bishop is inrolled, this is good albeit the confirmation of the dean and chapter be not inrolled, for the assent upon the matter is made to the bishop. Co. Litt. 301. a.

9. But if a bishop had made a charter of feoffment with a letter of attorney, and the dean and chapter before livery confirm the deed, this is a good confirmation and livery made afterwards is good, and so it has been adjudged. Co. Litt. 301. a.

(X) What Conveyance [or Words in a Conveyance] shall enure to a Confirmation.

S. P. accordingly, and not by way of feoffment, per tot. Cur. Br. Confirmation, pl. 9. cites S. C. — Fitzh. Confirmation, pl. 2. cites S. C. — So by the words *dedi & concessi*, this is a good confirmation; quære of the word *dimissi*. Br. Confirmation, pl. 20. cites Litt. Confirmation, 123. — So of *dedi or concessi*, but quære of the word *dimissi*. Br. Confirmation, pl. 31. cites Litt. [f. 531.] This word (*dimissi*) will amount to a Confirmation, Co. Litt. 301. b.

[1.] If a man makes a charter of *feoffment to a man who is seised of the freehold* by these words, *dedi concessi and confirmavi*, &c. this shall enure by way of confirmation. 19 H. 6. 45.]

Ow. 66, Knotts v. Everstead, S. C. adjudged, that by the feoffment nihil operatur.

[2. If there be *lessee for years*, the *reversion for life*, the *reversion in fee*, and he in the *reversion in fee* makes a charter of *feoffment in fee and livery to lessee for years*, admitting this to be void for the mean estate for life, this shall enure by way of confirmation to the lessee to enlarge his estate. M. 40, 41 Eliz. B. R. between KNOTSFORD AND EEDES, per Curiam.]

[3. If there be *tenant in tail*, the *remainder in fee*, and *tenant in tail grants a rent in fee* to him in the *remainder*, and after he in the *remainder grants over redditum predictum*; this shall be a confirmation of the rent, so that the remainder shall be charged with it after the death of tenant in tail without issue. M. 15 Jac. B. R. between DUTTON AND INGHAM, it was a question, for Houghton inclined that it should not be a confirmation, but Montague inclined the contra, and the others did not speak to it upon their last argument.]

by the granting the rent over this was a confirmation, and Montague said, that it was a confirmation during the estate tail, and shall enure as a new grant afterwards.

4. A. seised of land in fee, grants by deed *rent out of this land to B. for life*, the *remainder of the said rent to C. for life*, and afterwards by another deed *releases to C. and his heirs* all the right which he has in the rent; and if it shall happen that the said rent shall be in arrear, that it may be well and lawful to C. and his heirs to *distrain* for it in the said land. Resolved that this is a good remainder of a rent newly created, and that C. has a rent-charge in fee; for the *same* rent in this case, in construction of law, signifies the *like* rent. Adjudged and affirmed in error, Jenk. 30. pl. 58. cites 26 Aff. pl. 38.

5. So A. grants a rent-charge out of his land to B. for life, and A. afterwards confirms the estate of the said B. in the said rent to B. and his heirs; B. has only an estate for life. The word of confirmation doth not amount to the word grant. *Proprietates verborum sunt observanda*. Jenk. 30. pl. 58. cites 26 Aff. pl. 38.

6. A man made *feoffment in fee upon condition to reinfeoff him in tail, the remainder over, and after re-entered claiming nothing of the one estate or of the other*, and the next day the *feoffee made feoffment to him, habend' sibi & heredibus de corpore suo*, the remainder over

as above, and it was held a good gift and remainder, and not a confirmation; and yet he delivered the deed to him without livery, and a good gift in tail, and a good remainder. *It seems that it was upon the land, and then the re-entry of the feoffee remitted him, and by the livery of the deed upon the land this shall enure as a gift within the view, and then it amounts to a livery.* Br. Confirmation, pl. 27. cites 40 Ass. 10.

7. Avowry because his father was seised in fee, and gave in tail to J. and E. his feme, rendering 22 years 8 s. and afterwards 40 s. per ann. and shewed deed indented thereof, and shewed that the 22 years are past, and conveyed the tail to the plaintiff by descent, and for 4 l. for two years avowed upon the plaintiff as upon his tenant by the manner. Norton said, you yourselves confirmed the estate to us, habendum to us and our heirs by the deed which here is, tenendum by 8 s. after the 22 years passed, and demanded judgment if for more services may he avow. Skrene said, at the time of the confirmation you had nothing in the land, and demanded judgment and prayed return, and after the court would not record that the plaintiff pleaded it by way of confirmation, but by way of grant to hold by less rent; for the deed willed *noveritis me, the avowant, concessisse & confirmasse omnia terras & tenementa to the plaintiff, hæredibus & assignatis suis imperpetuum reddendo inde annuatim mihi, & hæredibus meis 8 s. for 42 years pro omnibus redditibus, &c. and well to plead it by way of grant; for confirmation of estate is not good but to him who is in possession.* Br. Avowry, pl. 48. cites 14 H. 4. 37, 38. [386]

8. If two jointenants are seised of certain land, the one cannot infeoff the other, for he cannot make livery by reason that the other is seised; but such feoffment shall enure by way of confirmation. Br. Confirmation, pl. 11. cites 22 H. 6. 42, 43. Pl. C. 156. b. cites S. C. & Fitzh. tit. Feoffment, pl. 11. & 102.—

S. C. cited Arg. 4 Mod. 150. S. P. and says it must be pleaded as a confirmation and not literally as the deed is worded.

9. If one coparcenor infeoffs his companion by deed by *dedi & concessi*, this shall enure by confirmation without livery; for it countervails *remisi & confirmavi*, per Littleton. Br. Confirmation, pl. 18. cites 10 E. 4. 3.

10. A. leases to B. for years, and after A. by deed indented bargains and sells the same lands to B. and his heirs, without any word of *give or grant* expressed in the deed; per omnes just. nothing passes by the deed without enrolment, and it is no confirmation. Mo. 34. pl. 113. Trin. 4 Eliz. C. B. Anon. Dal. 37. pl. 3. S. C. in totidem verbis.

11. Tenant in tail leases for years, and after lessor covenants and grants to lessee that he shall have and hold the land to him and others during the life of lessor. By the opinion of 3 justices, this is neither surrender nor confirmation to enlarge his estate, and is only a covenant notwithstanding the word grant; but Weston J. seemed e contra, by reason of the word grant. D. 272. pl. 34. Pasch. 10 Eliz. Cardinal v. Sackford.

And. 73. 12. A *grant and demise* of the land to tenant at will to hold for life rendering the ancient rent is a confirmation; per Cur. & S. P.—Bendl. 199. 3 Le. 15. pl. 35. Mich. 14 Eliz. Anon. pl. 277. S. C. held accordingly. — D. 269. b. at the end of pl. 20. the reporter says, the opinion of a grant made by the lessor to lessee at will for term of life was confirmed Hill. 14 Eliz. for a good confirmation to enlarge the estate without livery. — Ow. 1. S. C. adjudged.

Agreed by all the justices, that he may take it the one way or the other: and that the law suspends and expects till he has declared his pleasure. Godb. 139. pl. 170. Leonard v. Stephens, S. C. — 3 Le. 128. pl. 180. S. C. adjudged.

13. A. seised made a *lease for years* to J. S. the defendant, and afterwards, by his deed, containing *dedi, concessi & confirmavi, gave it to J. S. and his heirs, with a letter of attorney to make livery.* It was objected that this was not a feoffment, but a confirmation only, because of the word *confirmavi*; but Anderson Ch. J. said, that the lessee may take it *either as a feoffment or a confirmation*; and the court held it a feoffment. Goldsb. 25. pl. 6. Trin. 28 Eliz. Lennard's case.

[387] 14. A. by indenture, in consideration of love which he bore to his son, and for natural affection unto him, *bargained and sold, gave, granted, and confirmed* certain lands unto him and his heirs. This deed was *inrolled*; the question was, whether this land should pass, and it was held it should not, unless money had been paid, or state were executed; for the *use shall not pass*; but because the son was then in possession, it was held to enure by way of confirmation. Cro. J. 127. pl. 17. Trin. 4 Jac. B. R. Osborne and Bradshaw v. Churchman.

If I only use the words *dedi and concessi*, that is as strong as the word *confirmavi*; for it amounts to a grant of the right to the person in possession; and if he has my right, I can never after impeach his estate. Gilb. Treat. Ten. 75.

15. In some case this verb *dedi or concessi* shall enure to the same intent, as this verb *confirmavi*; as if I be disseised of a carve of land, and I make such a deed *Sciant presentes, &c. or Quod concessi* to the disseisor the said carve, &c. and I deliver only the deed to him, without any livery of seisin of the land, this is a good confirmation, and as strong in law as if there had been in the deed this verb *confirmavi*. Litt. f. 531.

16. Lease to A. for years, and after by his deed the lessor *voluit quod haberet & teneret terram pro termino vite sue*, this is adjudged by this verb (*volo*) to be a good confirmation of term of his life. Co. Litt. 301. b.

4 Mod. 150. Arg. cites S. C. and says that this shews that the pleading must be as the deed doth enure and operate, and not as the words are in the deed itself.

17. He to whom such a deed, comprehending *dedi, &c.* is made, may plead it as a grant, as a release, or as a confirmation at his election. Co. Litt. 301. b.

Here the heir of the disseisor grants the right of possession, and the disseisor the right of propriety; for every one grants what he lawfully may. Gilb. Treat. Ten. 75.

18. If the *disseisee and the heir of the disseisor join in a feoffment by deed*, this is the feoffment of the heir, and the confirmation of the disseisee; for the lands always pass from him that has the estate in him. Litt. f. 334. as abridged by Hawk. 395, 396.

(X. 2) What amounts to a Grant, and to a Confirmation too at the same Time.

1. **I**N assise it was said if *tenant for life grants a rent-charge in fee, and dies*, and he in reversion enters and confirms the charge, with *clause of distress*, this is good, and the reason seems to be because of the *clause of distress*, which makes it to be as a *new rent*; for clearly by the tenant for life and entry of him in reversion, the first charge is determined, which was granted by the tenant for life. Br. Grants, pl. 67. cites 14 Ass. 14.

So if the father grants a rent, with clause of distress for life, and dies, and after the son confirms the same grant, with clause

of distress, it is good. Br. Charge, pl. 44. cites S. C. — And if there be lord and tenant, the tenant holds by fealty and 10 s. rent, and the lord grants 2 s. of the rent to a stranger, and the tenant confirms the same grant with clause of distress, it is good. Br. Charge, pl. 44. cites S. C.

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2. The *abbot and covent of York leased to J. S. certain lands at will*; and afterwards by deed indented under their covent seal, reciting that whereas J. S. held of them certain lands at will, they granted and demised that land to the said J. S. to hold for life, rendering the ancient rent; and by the same indenture granted the reversion of the same land to a stranger for life. It was holden by the court clearly, that an estate for life accrueth unto J. S. by way of confirmation, and the remainder unto the stranger, depending upon the estate created by the confirmation. 3 Le. 15. pl. 35. Mich. 14 Eliz. C. B. Anon.

And. 23. pl. 46. S. C. adjudged accordingly; but that it is no grant of the reversion, and so it seems that the rent remains to the abbot during the life of J. S. quere.

—— Bendl. 199. pl. 237. S. C. and that it is a grant of an estate to J. S. for life, but that it is no grant of the reversion to the stranger.

3. A deed of one and the same thing by one and the same person to one and the same person, and at one and the same time, shall enure to 2 several purposes, viz. to a grant of the interest to lessee, and to a confirmation of the same interest as patron. 5 Rep. 15. a. cites Trin. 30 Eliz. in the Exchequer. Hodges v. Newcomen.

As if person [& ordinary] makes a lease for years to the patron, and afterwards the patron grants over

the same to J. B. this grant over by the patron of the said lease imports in itself as well a grant of the term as a confirmation of the same term. 5 Rep. 15. a. cites Trin. 30 Eliz. in the Exchequer. Hodges v. Newcomen. — S. C. cited by Coke Ch. J. and Doderidge, Roll. Rep. 361.

* Co. Litt. 301. b. 302. a. S. P.

4. So if *tenant for life grants a rent-charge to him in reversion in fee*, and the reversioner by deed grants it over to another, this is a good grant and confirmation also to make the rent good for ever. 5 Rep. 15. a. in case of Hodges & Newcomen cited there.

5. B. tenant for life of C. and he in the remainder or reversion in fee, having several estates in the one and the same land, join in a lease for years by deed indented, this demise shall work in this sort, viz. during the life of C. it is the lease of B. and confirmation of him in the reversion or remainder, and after the decease of C. it is the lease of him in the reversion or remainder, and the confirmation of B. For seeing the lessors have several estates, the

6 Rep. 14. b. 15. d. Mich. 36 & 37 Eliz. B. R. Treport's case adjudged. — S. C. cited Jo. 303.

law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease only of tenant for life, and the confirmation of him in the remainder or reversion. Co. Litt. 45. a.

6. If the disseisor grants a rent to the disseisee, and he by his deed grants it over, and after re-enters, one and the same words do amount both to a grant and to a confirmation in judgment in law of one and the same thing, *ne res pereat*. Co. Litt. 302. a.

5 Rep. 15.
a. S. P. per
Curiam.

7. If a disseisor makes a lease for life, or a gift in tail, the remainder to the disseisee in fee, and the disseisee by his deed grants over the remainder, and the particular tenant attorns, the disseisee shall not enter upon the tenant for life or in tail, for then he should avoid his own grant, which amounts to a grant of the estate and a confirmation. Co. Litt. 302. a.

If the confirmation had been to the husband and wife, to hold to them two and

8. If I lease to a feme sole for life, who takes husband, and I confirm the estate of the husband and wife, habend' for their two lives, they do not hold jointly, but he holds in her right for her life, yet it shall enure to him for his life by way of remainder if he survives her. Litt. f. 525.

their heirs, they had been jointenants to the fee-simple, and the husband seized in her right for her life, because they cannot take by moieties during the coverture. Co. Litt. 299. b.

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And so note a diversity between a lease for life, and a lease for years to a

feme covert; for her estate of freehold cannot be altered by the confirmation made to her husband and her, as the term for years may, whereof her husband may make disposition at his pleasure. Co. Litt. 300. a. — In either case of lease for years or life to her, this amounts to a new grant of the term for the life of the husband; for I cannot confirm the old term, but erect a new one, since the words import more than a confirmation of the old term; for in that the husband has nothing in his own right. Gilb. Treat. Ten. 73. cites Litt. f. 525, 526.

10. If a man hath common of pasture in other land, if he confirms the estate of the tenant of the land, nothing shall pass from him of his common; but notwithstanding this, the common shall remain to him as it was before. Litt. f. 537.

11. If a jointenant confirms the land to the other, this makes no alteration, for he confirms the estate in the same manner as it is; but if it be to have and to hold such lands to such jointenant only he has a sole estate; for then he expresses a design of confirming the possession to him alone, so that the confirmation goes to the possession itself by the explanatory words in the habendum, and not to the manner of possessing, and the words of the habendum make the confirmation enure as a new grant of such his moiety. Gilb. Treat. Ten. 72.

(Y) *In what Cases it shall be good.*
Confirmation of a void Thing.

Fol. 483.

[1.] **I**F a man be attainted of treason, and the king reverses it by his letters patents, this is void, because he cannot do it without a legal proceeding; and after the parliament, reciting the patent, ratifies, confirms, and approves it, and that he shall be restored to his land, &c. this act of parliament is a sufficient reversal of the judgment, because it recites the patent, and so gives life to the patent which was void. 29 E. 3. 25. adjudged.]

yet if it be confirmed by parliament, it is a good grant. Brooke says, quod mirum! for there was such a grant. Br. Confirmation, pl. 13. cites 38 H. 6. 34. 37. — But per Prisot, where the king grants a man to hold with an advowson which is in gross, the grant is void as to the advowson, and there if this be confirmed by parliament the confirmation does not make the grant good, because the advowson was not expressed in the grant, but in the habendum, and therefore a confirmation of the grant cannot make it good of that which is not contained in the grant. — Brooke says, quare if he had confirmed all that which is contained in the patent, it seems all one; for confirmation cannot make a void thing good. Ibid.

Fitzh.
Grant, pl.
100. cites
S. C. —
If the king
grants to W.
N. the land
of J. S. this
is a void
grant, and

2. If tenant in tail grants a rent-charge and dies, and the issue in tail enters and pays the rent, and after ratifies and confirms the same rent, this is good, and the grantee shall have assise; per Norton, which Brooke says is not law; for the grant was void by the death of the tenant in tail, and the entry of the issue; and then the confirmation of a void rent is also void. Br. Grants, pl. 73. cites 26 Aff. 38.

3. The incumbent pleaded, that he entered by the provision of the pope, and after the king confirmed his estate in the prebend; judgment. The king said, that he entered by spoliation [intrusion] in the time of another incumbent, and he confirmed, and so the confirmation void, in as much as he was in as spoliator, [intruder,] and not as incumbent, and so to issue. Br. Quære Impedit, pl. 47. cites 7 H. 4. 25. 37.

4. If a man takes away my villein in gross, and I confirm his estate in the villein, the confirmation is void; for of the person of a man there can be no possession without a right; but I may give him by the words dedi & concessi to him that took him away, or to any other, notwithstanding such wrongful taking; per Hobart Ch. J. Hob. 99. Trin. 7 Jac. cites Litt.

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Litt. f. 541,
542. S. P.
— If I
confirm a
villein to an-
other that
has him in
possession,
this passes

nothing; because this is an incorporeal right, which cannot be divested out of me, and the mere confirmation, where a man has no right, is really nothing; for that which is not, cannot be confirmed; but if there are the words dedi & concessi, it passes the right. Gilb. Treat. Ten. 74, 75. — Co. Litt. 306. b. 307. a.

5. A confirmation may make a voidable or defeasible estate good, but it cannot strengthen a void estate. Co. Litt. 295. b.

Though it
be a rule,
that things

ipso facto void cannot be made good by acceptance, yet it is not without exception; as tenant in tail makes a lease to commence in futuro, and dies before the day; the lessor [lessee] enters, issue in tail may have trespass against him, or he may by acceptance make it good; per Holt Ch. J. 12 Mod. 361. Patch. 12 W. 3. in case of Pullen v. Purbeck.

6. Tenant in tail makes a lease to commence in futuro, and after makes a feoffment in fee, and lease commences, feoffee may avoid it, or make it good by acceptance; per Holt Ch. J. 12 Mod. 361. in case of Pullen v. Purbeck.

(Z) Every Confirmation ought to *enure upon a Thing in Esse.*

In quare impedit, the incumbent pleaded collation to the prebend by the bishop, by which he was inducted, and the king confirmed to him for term of his life, and the king said, that he was not inducted at the time of the confirmation, and so to issue; and so note, that he had not possession before induction, and confirmation is not good without the possession; quod nota. Br. Confirmation, pl. 7. cites 11 H. 4. 9. S. C. — Fitch. Confirmation, pl. 16. cites S. C. & S. P. by Hank. and other justices.

[1.] If a bishop collates to a prebend, and dies before induction, and after the king before induction confirms to him for his life, yet this is not good, because he hath not any possession upon which the confirmation may enure at the time of the confirmation. 11 H. 4. 7. Com. 528. b. [S. C. cited by Manwood.]

2. Confirmation of rent or seignior is not good but in respect of a former estate or deed, and therefore if the first deed be lost, or be before time of memory, the confirmation is not good; per Huls, and Skrene, & non negatur. Br. Confirmation, pl. 24. cites 12 H. 4. 23.

Br. Avowry, pl. 48. cites S. C. 3. If lord and tenant are, and the tenant is disseised, and the lord confirms the estate of the disseisee to hold by less services, this is not good; for confirmation is not good, unless he to whom the confirmation is made has the possession or seisin at the time of the making of the confirmation. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

Br. Avowry, pl. 48. cites S. C. 4. But contra of release or grant; for those are good in respect of the seignior, because he is tenant as to the avowry. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

Br. Avowry, pl. 48. cites S. C. 5. So where tenant in tail discontinues and dies, and the donor releases, or grants to the issue in tail to hold quit, or by less services, though he has not possession at the time of the making, &c. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

Br. Avowry, pl. 48. cites S. C. 6. But contra as to the reversion of the land, and so note a diversity between release of the seignior and of the land, and between grant and release, and confirmation. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

7. But where there is lord, mesne, and tenant, and the lord confirms the estate of the mesne to hold by less services, this is good; for he is tenant in possession of mesnalty, and there is no other possession; note the diversity. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

8. In quare impedit by the king, the defendant pleaded confirmation made to him by the king by these words, *dedimus et confirmavimus to him then tenant of the land, and advowson appendant to it, &c.* and therefore well and not double; and so it seems that he who pleads confirmation ought to plead it made to him then tenant of the land, for otherwise a confirmation or a release cannot enure. Br. Confirmation, pl. 2. cites 9 H. 6. 22.

9. If a parson grants an annuity in fee, and resigns, and after the patron and ordinary confirm the grant, the confirmation is not good; for

for the annuity was void before by the resignation which was before the confirmation. Br. Confirmation, pl. 12. cites 21 H. 7. 1.

10. *A. usurped upon the patronage of one of the king's churches divers times, and had several clerks successively admitted, instituted and inducted, and for many years respectively they were incumbents of this church; A. has not gained the patronage by it; the king may grant this patronage to any one, for he is in possession, and the patronage is in him. The king confirms this patronage to this A. it is void, for A. has not any patronage. If the king confirms to the incumbent of A.'s presentation his incumbency is good, for he is incumbent de facto, and the king cannot remove him without a quare impedit by the statutes of 25 E. 3. and 13 R. 2. Judged and affirmed in error. The king can neither do wrong, nor suffer wrong. Jenk. 132. pl. 96. cites Cro. J. 123, Trin. 4 Jac. The King v. Matthew.*

Cro. J. 123. pl. 8. Trin. 4 Jac. B. R. The King v. Champion. S. P. and seems to be S. C. adjudged accordingly, and so a judgment in C. B. reversed, Fenner confentente, sed hæli. anter. — Yelv. 90.

The King v. Matthew. S. C. and judgment in C. B. reversed by 4 justices, but Fenner e contra. — Brownl. 166. S. C. but seems to be only a translation of Yelv.

11. If a disseisor make a lease for years to begin at Michaelmas, and the disseisee confirms his estate, this is void because he has but *interesse termini* and no estate in him, whereupon a confirmation may enure. Co. Litt. 296. b.

12. *Tenant for life of 20 acres grants his estate in one acre to J. S. and he in reversion confirms the estate of tenant for life to him and his heirs in all the 20 acres, this is a confirmation but of 19 acres, and though J. S. attorn, yet his acre shall not pass by way of grant of the reversion. Arg. Litt. R. 248. Pasch. 5 Car. C. B.*

(A. a) [In what Cases] A Confirmation shall [or shall not] *enlarge* an Estate.

[1.] *If lessee for life grants a rent to another for his life, and the lessor confirms it, this shall make the rent good for the life of the grantee, though before by limitation of law it ought to have determined by the death of the lessee. 45 Aff. 13.]*

Br. Confirmation, pl. 16. cites S. C. — Br. Rent, pl. 25. cites

S. C. that a man was seised of a carve of land, and leased two parts thereof to a feme for life; she took baron; the baron granted 10 s. rent out of it to W. N. for life; the lessor afterwards confirmed the said grant by deed, and by a clause therein granted further 10 s. rent of his own third part in his own hands. The baron and feme died, and the grantee brought assise of 20 s. rent. Dubitatur, whether the deed of confirmation shall be taken as of a new rent, or only of the first rent; quære, for non ad-judicatur.

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[2. *So if lessee for life grants a rent in fee to another, and he in the reversion confirms it, this is a good indefeasible rent in fee.*]

Litt. f. 529. S. P. — Co. Litt.

301. says that here a diversity is to be observed, where the determination of the rent is expressed in the deed, and when it is implied in law; for when *tenant for life grants a rent in fee*, this by law is determined by his death, and yet a confirmation of the grant by him in the reversion makes that grant good for ever, without words of enlargement, or clause of distress, which would amount to a new grant. But † if the tenant for life had granted a rent to another and his heirs, by express words, during the life

of the grantor, and the lessor had confirmed that grant; that grant should determine by the death of tenant for life. Co. Litt. 301. a.

† 1 Rep. 147. b. S. P. Arg. cites Litt. and 26 Aff. 38. and 45 Aff. 13. accordingly.

S. P. if he in reversion confirms it in the life of the lessee. [3. [80] If lessee for life grants a rent for life or in fee to another, and after surrenders to him in the reversion, and after he confirms it, this hath made the rent indefeasible. 26 Aff. per Welby.]

Br. Confirmation, pl. 15. cites S. C. — Br. Grants, pl. 73. cites S. C.

Br. Grants,
73. cites
S. C.

4. Confirmation may enlarge rent, as where a man leases land rendering rent, and the lessor grants the rent to a stranger, and after confirms the estate of grantee, and grants over by the same deed, that if the rent be arrear he may distrain, and the tenant for term of life dies, yet the rent remains. Br. Confirmation, pl. 15. cites 26 Aff. 38.

5. Contra it should be if the confirmation with clause of distress had not been. Ibid.

6. Lease for life rendering rent, the lessor granted the rent over, and the tenant attorned, and after the grantor confirmed the grant to the grantee, and that if the rent be arrear that the grantee may distrain, the tenant for life died, and yet the rent remained; for it was enlarged by the distress and confirmation, quod nota. Br. Rents, pl. 14. cites 26 Aff. 38 Quintin's case.

7. If a man leases for life rendering rent, and the lessor confirms to the tenant in fee or in tail rendering the rent, this enlarges the estate of the rent, and yet at the commencement the rent was determinable upon the death of the lessee. Br. Rents, pl. 14. cites 26 Aff. 38. Quintin's case.

8. If a man leases his land to J. S. for term of life, rendering 2 s. per annum, and after grants to another 2 s. out of the land which J. S. holds of him for term of life, to the grantee and his heirs during the life of the grantor, this shall be taken a grant of a new rent by him in reversion, and the grantee shall have the rent though J. S. die; per Shard and Fisher. Br. Rents, pl. 24. cites 34 Aff. 4.

9. Tenant for life grants a rent to W. N. for life, if he in reversion confirms the grant, and the tenant for life dies; yet the rent shall remain during the life of W. N. by reason of the confirmation, contrary if there was no confirmation. Br. Grant, pl. 80. cites 45 Aff. 13.

10. When the estate of him to whom confirmation is made is upon an express condition, there the confirmation made to him will not take away the condition. But if such a feoffee upon condition makes a feoffment over, so that his estate is only subject to a condition contained in another conveyance, but no condition is expressed or annexed by the feoffor to his estate, there the confirmation of his estate, which he had by absolute words, shall extinguish the condition which was annexed to the estate of the first feoffee. 1 Rep. 147. a. b. Arg. Hill. 35 Eliz. in Anne Mayow's case.

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11. If a lease be made to A. for the life of J. S. and this is afterwards confirmed to him for his own life; this is good to him now for his

his own life, because that his own life is greater; but if the lease were made unto him for his own life, and afterwards confirmed to him for the life of another, this confirmation is merely void, by Crooke J. Bullt. 136. Trin. 9 Jac. in case of Bowles v. Poore.

12. If a man leases land to J. S. for life, and after confirms his estate to hold to him and his heirs, this confirmation as to his heirs is void; for his heirs cannot have his estate which was not but for life. But if he confirms his estate by these words, *to have the same land to him and his heirs*, this confirmation maketh a fee-simple; for the words to have and to hold, &c. goeth to the land and not to the estate. Litt. f. 524.

a farther intent than merely to confirm the estate, viz. to enlarge it to him and his heirs; and taking the grant strongest against the grantor, it must pass away the fee-simple.—Jenk. 30. pl. 58. the word confirmation does not amount to a grant.

Gilb. Treat. of Ten. 72, 73. cites S. C. and says, that by the words to have to him and his heirs, there appears to be

13. If I let land for years, by force whereof lessee is in possession, &c. and after I make a deed to him, &c. *quod dedi & concessi*, &c. the said land to have for his life, and I deliver him the deed, &c. presently he hath an estate in the land for his life. Litt. f. 532.

—Gilb. Treat. of Ten. 73. cites S. C. & S. P. because it amounts to a grant of the right to the person in possession; and if he has my right I can never impeach him afterwards.

The words dedi & concessi are as strong as the word confirmavi. Litt. f. 531.

14. And if I say in the deed to have and to hold to him and to his heirs of his body ingendered, he hath an estate in fee-tail. And if I say in the deed, to have and to hold to him and to his heirs, he hath an estate in fee-simple, for this shall enure to him by force of the confirmation to enlarge his estate. Litt. 533.

15. If a man be seized in fee of a rent-service, or rent-charge, grants the rent to another for life, and the tenant attorns, and after he confirms the estate of the grantee in fee-tail, or in fee-simple, this confirmation is good as to enlarge his estate according to the words of the confirmation, because he who confirmed at the time of the confirmation had a reversion of the rent. Litt. f. 549.

16. But where he grants a rent-charge to another for life, if he wills that the grantee should have an estate in tail, or fee, the deed of grant of the rent-charge for life must be surrendered or cancelled, and then to make a new deed of the like rent-charge, to have and perceive to the grantee in tail or in fee. Litt. f. 550.

as by the surrender; and the reason why the deed should be surrendered or cancelled is, lest the grantor should be doubly charged, viz. with the old grant for life, or with the new grant in fee. Co. Litt. 308. b.

By cancelling of the deed, the rent which lies only in grant, ceaseth as well

17. If a man grants a rent-charge issuing out of his land to another for term of his life, and after he confirms his estate in the said rent, to have and to hold to him in fee-tail, or in fee-simple, this confirmation is void as to enlarge his estate, because he that confirmeth hath not any reversion in the rent. Litt. f. 548.

But, note, Littleton intends his deed of confirmation not to contain any clause of distress; for otherwise, as to the confirmation, the deed is void, but the clause of distress amounts to a new grant. Co. Litt. 308. a.

Here the diversity is apparent between a rent newly created, and a rent in esse.

Confirmation.

18. A. grants a lease for 28 years and a half to B. and suffers a recovery, and reciting that he had granted a lease to B. for 29 years declares, that the recovery should be to the use of B. for 29 years. This * was held to be a confirmation for the 28 years and a half, and the other half year an addition only. Arg. Litt. R. 281. Trin. 5 Car. cites it as a case in the Court of Wards of Willoughby v. Barker.

(B. a) The Effect thereof as to altering the Quality of the Estate.

1. **A** Confirmation of the estate of tenant in dower, to hold to her for her life, does not enlarge her estate, and therefore cannot take away the descendible quality to the heir of having action of waste against her after an assignment made by her of her estate; per Cur. 9 Rep. 142. 2. Pasch. 10 Jac. cites 38 E. 3. 23. a. b.

Br. Ancient
Demesne,
pl. 8. cites
S. C.

2. The lord by his confirmation by *dedi concessi & confirmavi* to the tertenant in possession, to hold at common law, shall change the ancient demesne into frank-fee; per Belknap clearly. Br. Confirmation, pl. 5. cites 49 E. 3. 7, 8.

† Litt. f.
536.

3. And so see that the lord by confirmation may change his feigniory, but he cannot change the possession of the land, which appears, tit. Confirmation, in † Littleton, where the estate is upon condition or charged with rent, &c. Confirmation cannot alter it, but confirmation to a particular estate may enlarge it by words of habendum, &c. Ibid.

Br. Waste,
pl. 71. cites
S. C. but
cites it as by
Ascham,
that he shall
be charged
in waste, for
now he is in

4. If I lease land to J. S. for years, and that he shall not be impeached of waste during the term, and afterwards I confirm his estate for term of life; yet if he does waste after the confirmation, during the term, he shall not be charged in waste notwithstanding the confirmation, per Ascham; but Loddington denied it, and Babington agreed with Loddington. Hill. 5 H. 5. 9. a. pl. 20.

of other estate, and the greater estate shall determine the less which is the term. — Roll. Rep. 183. cites 5 E. 3. 9. [according to the opinions of Loddington and Babington] that he shall be charged in waste. but says nothing of Ascham [as to which Brook seems misprinted; his opinion being e contra]. — 8 Rep. 76. a. b. S. C. cited by Coke Ch. J.

Er. Quare
Impedit, pl.
112. cites
38 H. 6.
33. S. C.

5. Where the king granted advowson to three in fee ad effectum, that they grant over to the nuns of Sion of the foundation of the king, and they pleaded that they granted it to the abbess of Sion and her successors in fee, and did not say, if they were of the foundation of the king or not, and therefore ill; for this word (*effectum*) is a condition by all the justices. Br. Confirmation, pl. 13. cites 38 H. 6. 34. 37.

Br. Quare
Impedit, pl.
112. cites
3 H. 6. 33.
S. C.

6. By which he pleaded confirmation of this grant to three by act of parliament to prove it to be without condition, and to his intent the confirmation tolls and takes away the condition, and all the justices were e contra; for the confirmation perfects the grant in such form as it is, so that if it be conditional it remains conditional, and the estate is not changed by the confirmation. Contra if the parliament had made a new act. Ibid.

7. If

7. If *lessee for years, without impeachment of waste, accepts a confirmation of the land to him for his life, the privilege is destroyed.* 11 Rep. 83. b. in *Lewis Bowles's case*, cites 28 H. 8. D. 10. b.

8. *A. infeoffed B. upon condition. A. and B. by deed granted a rent-charge to C. The condition is broken. A. re-enters. C. distrained, and A. brought replevin. Adjudged that the confirmation was good, and especially as the grant and confirmation are both by one and the same deed, so that the rent never was subject to any condition, and by all * the justices the rent remains good.* 1 Rep. 146. b. *Hill. 35 Eliz. Mayow's case.*

ation. — S. C. cited 10 Rep. 49. a. — S. C. cited Lane 38. — 9 Rep. 140. a. 142. a. cites S. C. — Cro. C. 478. cites S. C. — Co. Litt. 301. a. S. P.

Poph. 50. *Kettle v. Maſon, S. C.* adjudged accordingly, because the grant of A. shall enure to C. by way of confirm-

9. If a *feoffee upon condition makes a feoffment over, and the first feoffor confirms the estate of the last feoffee, he shall hold the land discharged of the condition, because his feoffment was made absolutely without any condition expressed in his feoffment; per Gawdy. But Popham denied this, as it appeareth by Littleton, tit. Descents, because he hath his estate subject to the same condition, and in the same manner as his feoffor hath it, into whosoever hands it happen to come, and therefore the confirmation shall not discharge the condition, but is only to bind the right of him who made it, in the possession of him to whom it is made, but not upon condition.* Poph. 51. Pasch. 36 Eliz. in the case of *Kettle v. Maſon and Eſterby.*

* [395] S. P. according to the opinion of Gawdy, that it makes the estate simple and absolute, where it was conditional before. 9 Rep. 140. a. Pasch. 10 Jac. in the Court of Wards.

10. If a man *leases land to the husband and wife, to have and to hold the one moiety to the husband for his life, and the other moiety to the wife for her life, and the lessor confirms the estate of them both in the land, to have and to hold to them and their heirs; by this confirmation, as to the moiety of the husband, it enureth only to the husband and his heirs, for the wife had nothing in that moiety; but as to the moiety of the wife, they are jointenants, as hath been said, for the husband hath such an estate in his wife's moiety in her right as is capable of confirmation.* Co. Litt. 299. b.

11. *But if such a lease for life be made to two men by several moieties, and the lessor confirms their estates in land, to have and to hold to them and to their heirs, they are tenants in common of the inheritance; for regularly the confirmation shall enure according to the quality and nature of the estate which it doth enlarge and encrease.* Co. Litt. 299. b.

12. A confirmation cannot *add a descendible quality to one that is disabled to take by descent; per Cur. 9 Rep. 141. b. Pasch. 10 Jac. in the Court of Wards, in Beaumont's case.*

13. *As if lord and tenant are of a carve of land, and the tenant has issue, and is attaint of felony, and the king pardons him, and afterwards the lord confirms this estate of the tenant, and the tenant dies. The lord shall have the land against his own confirmation, because the confirmation cannot add to the estate of the tenant a quality descendible to him who was disabled to take the land by descent; per Cur. 9 Rep. 141. b. Pasch. 10 Jac. in the Court of Wards, in Beaumont's case,*

Confirmation.

14. *J. B. and his wife being seised in special tail, remainder to J. B. in fee, he alone levied a fine to E. 6. in fee, which estate came to the earl of Huntington in fee. B. having issue died. His wife entered. The earl of Huntington confirmed the estate in the wife, habendum to her and the heirs of the body of her and her husband; and it was ruled, that the confirmation wrought nothing, because she had as great an estate before; and also, the issues could not be made inheritable which were before barred by their father's fine, and the estate tail as against them lawfully given to another; per Hobart Ch J. Hob. 257. in pl. 340. Trin. 15 Jac. cites 9 Rep. 140. Beaumont's case.*

* Litt. f.
527.
† Litt. f.
529.

15. If my * disseisor, or my † tenant for life, charge the land with a rent-charge in fee, and I confirm it, I shall for ever afterwards hold it charged, because I have assented to the estate which has a being from such disseisor tenant for life, and therefore I cannot afterwards destroy it. Gilb. Treat. Ten. 73.

[396] (C. a) Where a Confirmation to one shall enure to another.

1. **I** F baron makes a gift in tail of his wife's land, rendering rent, and afterwards they both grant the reversion by fine, this bars the feme of the whole; but if they had granted the rent only by the fine, then the feme might enter after the baron's death; per Caril; as Brown and Walmfley vouched it. Mo. 91. pl. 224. Trin. 10 Eliz. Anon.

Le. 243. pl.
329. Geo-
fries v.
Coites, S.C.
It was con-
ceived that
the accept-
ance of the
rent of J. S.
the lessee for
life, affirms
the lease also
in remain-
der, cites
Litt. f. 521.
and says, that such was the opinion of Gawdy and Fenner J.

2. A, tenant for life, the remainder to B. in tail, join in a lease to J. S. for life, the remainder to J. D. for life. A. dies. B. accepts the rent of J. S. and dies. The issue of B. accepts the rent of J. S. and after enters, and levies a fine to J. N. J. S. re-enters and dies. J. D. as in his remainder enters. The point was, if J. N. the purchaser might avoid this lease in the remainder, or if the acceptance of the rent from A. made the lease good to J. D. in the remainder? It was adjudged, that the estate in remainder was good, and not to be avoided by J. N. the purchaser. Cro. E. 252. pl. 22. Mich. 33 & 34 Eliz. B. R. Jeffrey v. Coytes.

3. If a lease be made to two, and the issue in tail accepts the rent of one of them, and saith he will accept him only for his tenant, yet it is good for both; per Gawdy. Cro. E. 253. pl. 22. Mich. 33 & 34 Eliz. B. R. in case of Jeffrey v. Coyte.

If a man re-
leases to te-
nant for life
all his right,
this enures to
him in the

4. If the disseisor infeoffs A. and B. and the heirs of B. and the disseisee confirms the estate of B. for his life, this shall not only extend to his companion, but to his whole fee-simple; because to many purposes he had the whole fee-simple in him, and the confirmation

confirmation shall be taken most strong against him that made it. Co. Litt. 297. b.

remainder, because he parts with

his whole; and he that has but an estate for life, by the feudal conveyance cannot have the whole fee, as is said; but if a man confirms the estate for life, it is an approbation and assent to that estate only, and therefore the assent being no farther than to the estate for life, it cannot be carried to strengthen the remainder; but if he had confirmed the remainder, that had confirmed the estate for life by implication, because the remainder cannot be without the particular estate to support it, therefore the confirmation of the remainder must imply an assent to all means necessary to support it. Gilb. Treat. Ten. 71.

5. If the disseisor makes a lease for life to A. and B. and the disseisee confirms the estate of A. B. shall take advantage thereof; for the estate of A. which was confirmed was joint with B. and in that case the disseisee shall not enter into the land and devert the moiety of B. Co. Litt. 297. a. b.

6. So if there be two disseisors, and the disseisee confirms the estate of the one without more saying in the deed, some say that he shall not hold his companion out, but shall hold jointly with him, for that nothing was confirmed but his estate, which was joint, &c. Litt. f. 522.

If a man confirms the estate to one of the disseisors, he only has the estate as he

formerly had it, which was jointly with the other disseisor; but if he confirms the estate of one disseisor in the lands, to have and to hold the lands, or his right to him and to his heirs, then such disseisor shall hold out his companion; for such habendum explains the manner of his confirmation, viz. that he should not hold the estate merely as it is, but in a manner more beneficial for him, that is, that he should hold the possession that he has per my & per tout to him only; for the habendum explains the assent, viz. that he should hold the possession sole, so that the possession in the whole being confirmed to him only, he has the total right to such possession, and therefore may hold out his companion. Gilb. Treat. Ten. 71, 72.

7. If a disseisor make a lease for life, reserving the reversion to himself, and the disseisee confirms the estate of the disseisor, by the confirmation made to him in the reversion, all the right of him that confirms is gone, as well as when he makes it to him in remainder, and he cannot by his entry avoid the estate of the lessee for life without avoiding the estate of the lessor, which against his own confirmation he cannot do; and it has been adjudged that if a disseisor make a lease for life, and after levy a fine of the reversion, with proclamations, and the 5 years pass, so as the disseisee is for the reversion barred, he shall not enter upon the lessee for life. Co. Litt. 298. a.

[397]

(D. a) Where a Confirmation of Part of the Estate shall be a good Confirmation of the Whole.

1. A Parson made a lease of his rectory for 40 years. The patron and ordinary confirmed the same for 20 years immediately ensuing the commencement of the term, and annexed the same in a schedule to the indenture. Some held this good, but more e contra. D. 52. b. pl. 4. Trin. 34 H. 8.

Winch. 95. Trin. 22 Jac. C. B. Hutton J. cites S. C. as agreed that this

confirmation shall stretch for the whole time.

2. A prebendary made a lease for 70 years, and the bishop patron of the said prebendary, and the dean and chapter, by their several instruments

Cro. E. 44. pl. 12. Pelford v.

Forod. S.C. instruments under their common seal (reciting the said lease) *confirmed dimissionem predictam in forma predicta factam for the term of 51 years, et non ultra.* Mich. 37 & 38 Eliz. C. B. Anderson and the other justices held strongly that the lease was not good but for 51 years only, for they might confirm for all or part, and the confirmation shall not be taken larger than they have made it; but *had they confirmed the demise, and not shown for what time, it should be the entire term*; but when they say for 51 years & non ultra, that very well qualifies what goes before, and it shall not be construed larger; sed adjournatur. — Ibid. 472. (bis) pl. 34. Pasch. 38 Eliz. C. B. Bedford v. Ford, S. C. resolved that the confirmation goes to the whole term, and cannot be abridged by the following words, and judgment accordingly. — And. 47. pl. 119. cites S. C. & S. P. as adjudged accordingly by all the justices. — Bendl. 238. pl. 265. S. C. Pasch. 16 Eliz. where it was adjudged that the confirmations were good for 51 years at least, and not void, because the said bishop and dean and chapter might so make their several confirmations at their will specially. A prebendary of Sarum's case. — And. 47. pl. 119. S. C. adjudged good confirmations, and that they may severally confirm, and for parcel of the said term. — D. 338. b. 339. a. pl. 43. Mich. 16 & 17 Eliz. S. C. adjudged good as to the 51 years, but as to the residue the court doubted, but Geoffrey thought the confirmation clearly void in toto. — Het. 75. Hill. 3 Car. C. B. Tomlinson's case. Hutton J. thought the confirmation good only for the lesser number of years, but Richardson held e contra.

confirm for all or part, and the confirmation shall not be taken larger than they have made it; but *had they confirmed the demise, and not shown for what time, it should be the entire term*; but when they say for 51 years & non ultra, that very well qualifies what goes before, and it shall not be construed larger; sed adjournatur. — Ibid. 472. (bis) pl. 34. Pasch. 38 Eliz. C. B. Bedford v. Ford, S. C. resolved that the confirmation goes to the whole term, and cannot be abridged by the following words, and judgment accordingly. — And. 47. pl. 119. cites S. C. & S. P. as adjudged accordingly by all the justices. — Bendl. 238. pl. 265. S. C. Pasch. 16 Eliz. where it was adjudged that the confirmations were good for 51 years at least, and not void, because the said bishop and dean and chapter might so make their several confirmations at their will specially. A prebendary of Sarum's case. — And. 47. pl. 119. S. C. adjudged good confirmations, and that they may severally confirm, and for parcel of the said term. — D. 338. b. 339. a. pl. 43. Mich. 16 & 17 Eliz. S. C. adjudged good as to the 51 years, but as to the residue the court doubted, but Geoffrey thought the confirmation clearly void in toto. — Het. 75. Hill. 3 Car. C. B. Tomlinson's case. Hutton J. thought the confirmation good only for the lesser number of years, but Richardson held e contra.

Same difference taken by Richardson, Hutton, Hill. 3 Car. C. B. in Tomlinson's case, and agreed by Crooke and all the serjeants at the bar, and Hutton said it was a good case to be considered and to be moved again.

[398] 4. So if a lease be made of 20 acres, they may confirm as to part of the land, viz. as for one or more acres. 5 Rep. 81. b. Pasch. 37 Eliz. in Foord's case.

5. So they may confirm part or all upon condition. 5 Rep. 81. b. Pasch. 37 Eliz. in Foord's case.

Co. Litt. 297. a. S. P. 6. And as to the points above, nota a *diversity* between a naked assent, without any right or interest; for there the tenant who is to perfect a grant by his attornment cannot assent for a time, nor upon condition, nor for part of the thing granted, but it shall enure to the whole absolutely, because there is only a naked assent, which cannot be qualified or apportioned; but the bishop, who is patron, and the dean and chapter have *an interest* in the prebend and every part thereof; for the patron has jus conferendi, and a release to the patron of an annuity in the time of vacation is good. 5 Rep. 81. a. b. Pasch. 37 Eliz. in Foord's case.

An estate of freehold cannot be confirmed for part of the estate, for that the estate is entire, and not 7. Another *diversity* was taken between a lease for years and a lease for life, gift in tail, or feoffment in fee. For if prebendary makes lease for years, confirmation may be of the land (as before is said) for a less number of years, because the years are several, though the demise or term is one. But if he makes lease for life, or gift in tail, or feoffment in fee, and confirmation is made of the land to the lessee, donee, or feoffee, for an hour, it is good for

for ever; for estate of franktenement or inheritance is intire. 5 Rep. 81. b. Pasch. 37 Eliz. in Foord's case.

several as
years be.
Co. Litt.
297. a.
Litt. f. 520.
S. P. —
Cro. E. 472.
(bis) pl. 34.
Betford v.
Ford. S. C. & S. P.

8. And therefore if *he who has franktenement or inheritance be disseised, and confirms the estate to the disseisor for an hour, it is good for ever.* 5 Rep. 81. b. Pasch. 37 Eliz. in Foord's case.

9. If *disseisor makes lease for years, of 20 acres, the disseisee may confirm all or any part of the land to the lessee, for all or some of the years, and that upon or without condition; for though the term or demise be one, and therefore if the term or demise be confirmed for an hour, it is good for ever, yet the years and acres are several, and therefore the confirmation may extend to part of them; pari ratione if my tenant for life makes a lease for years, I may confirm the land for fewer years.* 5 Rep. 81. b. 82. a. Pasch. 37 Eliz. in Foord's case.

S. P. but
then it must
be by apt
words, for
he must not
confirm the
lease, or de-
mise, or
estate of the
lessee; for
then the ad-
dition for
parcel of the

term should be repugnant when the whole was confirmed before, but *the confirmation must be of the land for part of the term; so the confirmation may be of part of the land, as if it be of 40 acres he may confirm 20, &c.* So if tenant for life make a lease for 100 years, the lessor may confirm either for part of the term, or for part of the land. Co. Litt. 297. a.

If he confirm the term of the lessee of the disseisor for some part of the years, he cannot defeat it during the whole term, because the term is confirmed; and the last words being derogatory from his own grant, must be rejected; but if he *confirms the land to the termor for part of the term and no longer*, this is good, because the party that had right did not totally assent by express words, as he did in the two former cases; for if he did, no derogatory clauses from such assent could be admitted; but his assent was originally but partial, and not to the whole estate, and therefore it cannot, contrary to the express words, be carried any farther. Gilb. Treat. Ten. 70.

10. So if *tenant in tail makes a lease for 40 years and dies, the issue in tail may confirm all the term or part, &c. for fewer years.* And the same law of a feme after the coverture. 5 Rep. 82. a. Pasch. 37 Eliz. in Foord's case.

11. When the *estate is divided*, as if an estate be *for life, remainder over*, the confirmation may be to either of them. So if lessee of disseisor for 20 years makes a lease for 10 years, the disseisee may confirm it to either of them, and not to the other. Per Walmley. Cro. E. 472. (bis) pl. 34. Pasch. 38 Eliz. C. B. in case of Betford v. Ford.

[399]

12. If the disseisor make a *gift in tail*, and the disseisee confirms the estate of the donee *for the life of the donee*, this confirmation enures to the whole estate tail; for a confirmation can make no fraction of any estate to extend but to part of the estate only. Co. Litt. 296. b.

S. P. so of a
lease for life,
if the dis-
seisee con-
firms the
land to the
lessee or do-

nee for an hour, this will confirm their whole estate, but shall not enure to the remainder or reversion, because he confirms the land to the lessee or donee only, and the estate for life or in tail, and the remainder or reversion are several distinct estates. 5 Rep. 81. b. in Foord's case. — Litt. f. 520.

13. If a *disseisee makes a confirmation to the disseisor in tail, or for any particular estate*, this is a good confirmation for ever; for the disseisee had a fee-simple, and the confirmation cannot make a *fraction* of his estate so as to extend to *part* of it only. Co. Litt. 296. b.

14. If

Confirmation.

14. If the *parson* makes a lease for 100 years, the patron and ordinary may confirm 50 of the years, for they have an interest and may charge in time of vacation. Co. Litt. 297. a.

15. If the *disseisor* makes a gift in tail, the remainder to the right heirs of tenant in tail, if the *disseisee* confirm the estate in tail, it shall not extend to the fee-simple. Co. Litt. 297. a.

16. So if the *disseisor* had made a gift in tail, the remainder for life, the remainder to the right heirs of tenant in tail, this extends only to the estate tail and not to the remainder for life, nor to the remainder in fee. Co. Litt. 297. a.

Litt. f. 519,
520.

17. If a man confirms the *disseisor's* estate for an hour, this passes the fee even without the words heirs, because the *disseisor* has the fee; and when that estate is assented to, the *disseisee* can never afterwards destroy it. Gilb. Treat. Ten. 70.

(E. a) Where a Privy is requisite in a Confirmation.

1. Confirmation of estate is not good but to him who is in possession. Br. Avowry, pl. 48. cites 14 H. 4. 37, 38.

Co. Litt.
305. a. S.P.
And
where it abridges services, privy is requisite regularly. Co. Litt. 305. b.

2. Where a confirmation shall enlarge an estate, there privy is required, as well as in the case of the release. Co. Litt. 296.

But where there is lord, mesne, and tenant, and lord confirms the estate of the mesne to hold by less services, this is good; for he is in possession of the mesnalty, and there is no other possession. Br. Confirmation, pl. 8. cites 14 H. 4. 37.

3. If there are lord, mesne, and tenant, the lord cannot confirm the estate of tenant to hold of him by less services, because there is no privy between them, and a confirmation cannot make such an alteration of tenures. Co. Litt. 305. b.

[400] 4. If tenant in tail makes a feoffment in fee to the use of himself in fee, and after leases it for years rendering rent and dies, the issue being remitted by the descent of the reversion before entry, the estate for years is also changed into a tenancy at sufferance, because there is not any privy between his estate and the lease, and therefore no acceptance of the rent can confirm it. See 2 Roll. Remitter (K) pl. 8. and the note there.

(F. a) In what Cases it shall alter the Tenures or Services.

1. If I lease land for life, and after confirm the estate to the tenant in fee, or in tail, rendering the same rent, now the estate in the rent is enlarged, because the estate in the land is enlarged to the tenant. Per Thorp J. Br. Grants, pl. 72. cites 26 Ass. 38.

(2.) The lord may diminish and abridge his services by confirmation made to his tenant, but he can not increase a rent or service, or reserve new by confirmation. Br. Confirmation, pl. 1. cites 9 H. 6. 9. per Babbington and Paston.

3. And

3. *And by them, if a man holds 10 acres of his lord by 12 d. and one acre by 1 d. by several tenures, and he confirms the estate of the tenant in both to hold by 4 d. this cannot make one and the same joint entire tenure, which was two tenures before; and if it shall enure, it shall be by gift of 2 d. out of the 10 acres, and 2 d. out of the one acre, out of which only issued 1 d. before, therefore quære inde; and quære if it cannot enure to have 1 d. out of the one acre, and 3 d. or the whole 4 d. out of the other 10 acres. Ibid.*

4. *If the lord confirms the estate which the tenant has in the tenements, yet the seignior remains entire to the lord as it was before.* Litt. f. 535.

The lord by confirming the estate doth not pass his right

to the seignior, because the confirmation or assent to that estate cannot be interpreted to pass that other distinct right which is in him, since the assent to one estate is no reason to conclude that he has parted with the other; but if he had released all his right, he had extinguished his seignior, because by such remitting his right, he could not have demanded any thing. Gilb. Treat. Ten. 74.

5. *By confirmation of the tenants estate, a rent-charge issuing out of the land or common of pasture in other land remain as before.* Litt. f. 536, 537.

Co. Litt. 305. a. says that some do infer from these 2 sections

and the next following, that a man cannot abridge a rent-charge or common of pasture by a confirmation, as he may do a rent service in respect of the privity between the lord and tenant, so as (they say) a tenure may be abridged by a confirmation, but not a rent-charge or common.

6. *If tenant holds of the lord by fealty, and 20 s. rent, and the lord by deed confirms the estate of the tenant to hold by 12 d. or 1 d., &c. the tenant is hereby discharged of all other services.* Litt. f. 538.

9 Rep. 142. a. S. P. in Beaumont's case.

7. *The lord upon a confirmation to the tenant cannot reserve new services, as a hawk instead of rent, or rent in lieu of a hawk, & sic. de similibus.* 9 Rep. 142. a. b. Pasch. 10 Jac. in the Court of Wards, per Cur. in Beaumont's case.

Litt. f. 539. S. P. — Co. Litt. 305. a. S. P. accordingly, that he cannot

reserve new services upon the confirmation, so long as the former estate in the tenancy continues. — The lord may abridge the services of his tenant by his confirmation, but he cannot enlarge them, or create new services; for when he has confirmed the estate by lesser services, he has granted to the tenant the services that are over and above what was specified in the confirmation; * because confirming the estate to hold by lesser services is, by implication, a grant or release of rent; for he could not hold by lesser services, unless the rest were released; but if he confirms to hold by greater or new services, this is void, because this doth not amount to a new grant from the lord. Gilb. Treat. Ten. 74. cites Litt. f. 538, 539, 540.

* [401]

For more of Confirmation in general, see Baron and Feme, Copple, Exchange, Tale, (D), and other proper titles.

Conquest.

(A) The Effect thereof.

1. *Franchises are extinguished immediately on the conquest, but not the laws of the land without proclamation; and so William the Conqueror extinguished all franchises in England but of churches, which the Pope would not permit him to take, for which reason they stand as before the conquest.* Arg. Mo. 670. pl. 918. Mich. 43 & 44 Eliz. B. R.

In the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the laws of God, and in

2. It was agreed, that according to CALVIN'S CASE, 7 Rep. 17. upon the conquest of an *infidel country*, all the *old laws are abrogated ex instanti*, and *the king imposes what laws he pleases*; and in case of the conquest of a *christian country*, he may change them at *pleasure*, and appoint such as he thinks fit; though Coke quotes no authority for it, yet it was agreed, that this might be consonant to reason. Show. Parl. Cases, 31. in case of Howell v. Dutton.

such case, where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity; held per Cur. 2 Salk. 412. pl. 1. Trin. 5 W. & M. in B. R. Blankard v. Gandy.

3. Where the king of England conquers a country, it is of a different consideration from a new and uninhabited country being found out by English subjects; for in the first case the conqueror, by saving the lives of the people conquered, gains a right and property in such people, and consequently may impose upon them what laws he pleases. 2 Wms.'s Rep. 75. cites it as said by the master of the rolls, 9 August, 1722, to have been determined by the lords of the privy council, upon appeal from the foreign plantations.

4. But till such laws given by the conquering prince, the laws and customs of the conquered country shall hold place, unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail. Ibid.

For more of Conquest in general, see other proper titles.

Consent.



(A) The Force thereof.

1. **I**N all cases when any *thing executory* is created by deed, it may, by consent of all persons that were parties to the creation of it by their deed, be *defeated* and annulled, and therefore it was said, that *warranties, recognizances, rents, charges, annuities, covenants, leases for years, uses at common law, &c.* may, by a *defence* made with the mutual consent of all that were parties to the creation of them by deed, be annulled, discharged, and defeated. 1 Rep. 113. Hill. 28 Eliz. in Albany's case.

2. A consent *ex post facto* is not of any signification; for it cannot be had for things which cannot be otherwise; per Vaughan Ch. J. Mod. 312. Pasch. 22 Car. 2. in Canc. in case of Fry v. Porter.

3. The consent of the ~~law~~ makes good a *void devise*. Chan. Cases, 209. Trin. 23 Car. 2. *Ld. Gornbury v. Middleton*. But though it binds himself, it shall not bind, or put a bargain on another. Arg. *Ibid.*

4. Consent of remainder-man for life, though but *verbal*, is binding, and decreed to confirm *building leases* accordingly. 2 Chan. Cases, 28. Pasch. 32 Car. 2. *Sidney v. the Earl of Leicester*. But whether remainder-man in tail on such consent should be decreed to confirm, lord chancellor would advise. *Ibid.*

5. Consent to a trial of a title to land in another county than where the land lies will not help, it being an error, though such consent be of record; agreed per Cur. 2 Show. 98. pl. 97. Pasch. 32 Car. 2. B. R. *Ld. Clare v. Reach*. But Raym. 372. Lord Clare v. Linch, S.C. resolved by all, that the trial was well had.

6. A *burgess* of a corporation consenting to be turned out from his burgess's place, and the common council of the corporation removing him accordingly, does not amount to a resignation, and a *preceptory mandamus* was granted to restore him. Holt's Rep. 450. Hill. 8 Anna. B. R. *The Queen v. Mayor of Gloucester*.

For more of Consent in general, see *Authority, Conditions, Powers, Trial*, (S. a. 2), and other proper titles; and see *MAXIMS*, beginning with the word *CONSENSUS*.

Consequential Losses or Damages.

(A) Actions: In what Cases Actions lie for consequential Losses or Damages.

A man may lawfully make a dam on his own ground; but if by making it the water overflows his neighbour's ground, an action on the case lies against him; per Curiam. 8 Mod. 275. Trin. 10 Geo. 1. in case of Reynolds v. Clerk.

In this case the stranger is the trespassor, and not I that am the owner; so if I am carried by force into the land of B. I am not the trespassor, but he that carried me; per Roll J. Sti. 65. Mich. 16 Car. B. R. Smith v. Stone.

Cro. J. 324. in pl. 2. Mich. 11 Jac. B. R. the S. C. cited per Cur.

3. Action lies for calling one *bastard* whose grandfather had lands in tail, though the plaintiff was *youngest son* of the father; yet being offered a sum of money by a purchaser to join in the sale, and afterwards the purchaser refusing to give him any thing by reason of those words. It was held, though he has no present title, yet it appears he is, by a possibility, inheritable to those lands, and being offered money for that possibility to join in the assurance, but it being afterwards refused to be given him by reason of those words, is a present damage, and *he may receive prejudice thereby in futuro* in case he were to claim any land by descent. Affirmed in error. Cro. J. 213. pl. 6. Mich. 6 Jac. B. R. Vaughan v. Ellis.

S. P. per Coke Ch. J. Roll. Rep. 124. in S. C.

4. A *smith pricks the horse* of a servant being on his journey to pay money for his master to save the penalty of a bond, both the master and servant may have their several actions on the case for the several wrongs they have thereby sustained; per Coke Ch. J. 2 Bulf. 334. Hill. 12 Jac. in case of Everard v. Hopkins.

5. Where one is *party to a fraud*, all which follows by reason of that fraud, shall be said as done by him. Arg. Cro. J. 469. Hill. 15 Jac. B. R. in case of Southern v. How.

6. Action lies for *threatening workmen* to *claim* and prosecute them, whereby the master lost the selling of his goods, the men not daring to go on with their work. Cro. J. 567. pl. 4. Pasch. 18 Jac. B. R. Garret v. Taylor.

7. A. *contracts with B. to make an estate of Bl. Acre at Mich. to B.* If C. enters into Bl. Acre, A. may have an action on the case against C. for the special damage which may happen to him by

Consequential Losses or Damages.

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by reason that he is *disabled to perform* his contract, by reason of C.'s entry, and he shall declare *contra pacem*, but not *vi & armis*. Per Doderidge J. Godb. 426. pl. 492. Trin. 21 Jac. B. R.

* 8. A. *breaks the fence* of B. by which *cattle get into* C.'s ground, C. shall have case against A. but not trespass. Per Roll. Sty. 131. Mich. 24 Car. B. R. in the case of Sir A. A. Cowper v. St. John.

9. Though a man does a lawful thing, yet if any damage do thereby befall another, he shall answer *if he could have avoided it*; and this holds *in all civil cases*. As if a man *lops a tree* and the boughs fall upon another *ipso invito*, yet an action lies. So if a man *shoot at butts* and hurt another unawares. So if I have land through which a river runs to your mill, and I lop the fallows growing on the river side, which accidentally *stop the water* so as your mill is hindered. So if I am building my own house, and a *piece of timber falls on my neighbour's house* and breaks part of it. So if a man assaults me, and I *lift up my staff to defend myself, and strike another* in lifting it up; but it is otherwise *in criminal cases*, for there *actus non facit reum nisi mens sit rea*. Per Raymond J. Arg. Raym. 422, 423. Hill. 33 & 34 Car. 2. B. R.

Raym. 467, 468. Trin. 34 Car. 2. S.C. & S.P. in totidem *ve. bis.*

10. If A. *beats my horse by which he runs on* B. A. is the trespassor and not I. 2 Salk. 638. per Cur. Pasch. 7 W. 3. B. R. in case of Gibbon v. Pepper.

S.C. & S.P. per tot. Cur. Ld. Raym. Rep. 38, 39.

11. He that makes a *fire in his field* must see that it does no harm, and answer the damage if it does; but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shewed it. 1 Salk. 13. pl. 4. Mich. 9 W. 3. B. R. Turbervil v. Stamp.

12 Mod. 151. S.C. & S.P. by 3 judges accordingly.—Carth. 425. S.C. ad.

judged. — Ld. Raym. Rep. 364. S.C. adjudged by 3 justices *contra* Terton.

12. A. contracted with B. to bring timber in A.'s cart and deliver it in B.'s yard, it was brought in a cold day; B. refused to come and unload it, whereby the *horses got cold and 2 died*; A. brought action but could not obtain judgment; cited per Holt Ch. J. Cumb. 481. 10 W. 3. B. R. as in the case of Bertue v. Bourn.

13. If a *constable places a dragoon* where it is *unlawful* for him so to do, he must make satisfaction for the consequential damages, as letting drink about the cellar, &c. For since the placing him there is unlawful, it shall be taken as if the constable had put him there on purpose to do an unlawful act. Per Holt Ch. J. 5 Mod. 430. Hill. 10 W. 3. in case of Parkhouse v. Foster.

At common law, if a man does an unlawful act he shall be answerable for the consequences of it especially,

whereas in the principal case the act is done with intent that consequential damages shall be done; per Holt Ch. J. Ld. Raym. Rep. 480. Trin. 11 W. 3. in case of Parkhurst v. Foster, S.C. — 12 Mod. 254, 255. Parker v. Flint, S.C. resolved that the constable shall be answerable for all damage done by the dragoon.

14. Action on case *for stopping a way* leading to his colliery, by which he lost his customers, lies not without special damages. Cumb. 480. Trin. 10 W. 3. B. R. Iveson v. Moor.

See tit. Actions (N. b) pl. 19.

15. *After a recovery of damages in assault, battery, &c.* no action will lie for consequential damages, as that he was afterwards

For it is to be supposed that when a

Consequential Losses or Damages.

man reco- forced to be trepanned, and had a bone taken out of his skull.
vers da- 12 Mod. 542. Trin. 13 W. 3. Fitter v. Veal.
mages, it is according to the damages received by him, and that the jury gave intire satisfaction for the battery.
Ibid. 543. per Cur.

16. If A. enters into my grounds, and *breaks down my wall, which keeps out the sea*; and I bring my trespass, and *recover damages*, and I *re-build* my wall, but *by reason of the newness* thereof it is *broke down by a new storm*, which the old wall would have resisted. Per Cur. the plaintiff shall recover for the overflowing of his lands, and to re-build his wall; and the danger of the new wall, if there be any thing in that too, may be considered; but this *must be all at once*. Arg. 12 Mo. 543. Trin. 13 W. 3. in the case of Fitter v. Veal.

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17. It is a *fundamental principle* in law and reason, that he that does the first wrong shall answer for all consequential damages. 12 Mod. 639. per Cur. Hill. 13 W. 3. in case of Roswell v. Prior.

18. If one takes another prisoner by wrong, and then turns him over to another officer, who detains him, the first taker shall answer for all the consequential damages. Per Cur. 12 Mod. 640. Hill. 13 W. 3. in the case of Roswell v. Prior.

19. He that keeps goods by wrong must answer for them at his peril at all events, for his detainer is the reason of the loss. 2 Salk. 523. per Holt Ch. J. Trin. 2 Ann. B. R. in case of Coggs v. Bernard.

6 Mod. 179. Trin. 3 Ann. B. R. per Cur. S. P. in S. C. 20. If A. *wrongfully imprisons B.* and the gaoler detains him till *so much is paid*, in this case he who was the prisoner shall have an action of false imprisonment against A. for imprisoning, and detaining him until he paid *so much money*; and this is a taking by A. and it must be illegal to use any unlawful means to oppress another, and A. is guilty of the oppression and extortion committed by the gaoler. 3 Salk. 193. in case of the Queen v. Tracy.

21. A. has a market and toll, and B. is coming with goods to the market, for which, if sold, toll would be due, and C. hinders B. coming to the market; the lord of the market may have action because of the possibility of damages; per Powell J. 6 Mod. 49. Mich. 2 Annæ B. R. in case of Ashby v. White.

But if such damage could not be avoided, it seems no action lies. See Raym. 4^o 3. — So where J. S. erected a mill-dam, part on his own land, and part on land of A. and A. pulled down the dam on his land, by which all the dam fell down and the water ran out. This was held justifiable. Cro. E. 269. pl. 10. Hill. 34 Eliz. B. R. Wigford v. Gill. — So if A. erects a wall, part on his own and part on B.'s land, and B. pulls down the wall upon his land, and so all the wall falls down, this is lawful. Ibid.

22. Where a man does a *lawful act*, and a damage results from such act, an action of *case* lies, and not an action of *trespass*. 8 Mod. 272. Trin. 10 Geo. 1. Reynolds v Clerk.

23. If a man keeps a *beast of a savage nature*, as a lion, &c. it is at his peril to keep him up, and he is answerable for all the consequences of his *getting loose*; per Raymond Ch. J. Gibb. 187. Mich. 4 Geo. 2. B. R. in the case of the King v. Huggins.

For more of Consequential Losses or Damages in general, see Actions, (B), &c. and (H), &c. and other proper titles.

Consideration.

(A) What it is; and where necessary.

1. **A** Consideration is a cause or occasion meritorious, requiring a mutual recompence in deed or in law. Arg. See D. See Action [of Assump- sit] (U) to (Z).—Uses (G. 4).

336. b. Trin. 16 Eliz. in Calthorp's case.

2. An use declared on a state executed needs no consideration; [406] per Cur. Mo. 102. pl. 247. Mich. 16 & 17 Eliz.

3. A consideration is necessary to create a debt, otherwise it is nudum pactum. Jenk. 290. in pl. 27.

4. Where debt is brought for money due, without any circumstance of forbearance of suit by the plaintiff for a time, a particular consideration ought to be shewn in the declaration. Jenk. 292. pl. 37. But a promise to forbear a suit paululum temporis is

no consideration to maintain an assumpsit, for it may be the next minute; but promise to forbear for a reasonable time is a good consideration, for it is left to the court to judge of it. Jenk. 301. pl. 71.—An indebitatus assumpsit generally for 20 l. to pay the said 20 l. will not maintain an assumpsit without shewing some consideration. Jenk. 330. pl. 61.

5. A bond implies a consideration in itself, and therefore it was held by the court, that a man was not bound to discover what was the consideration. Hard. 200. Trin. 13 Car. 2. in the Exchequer, Turner v. Binion. And baron Atkins said, it had been so ruled in chancery. Ibid. —

But see tit. Nudum Pactum (A), pl. 7. Negus v. Fettiplace.

6. Nudum pactum will not raise an use, nor can a use be raised without a consideration; agreed. Arg. Cart. 141. Mich. 18 Car. 2. C. B. See tit. Uses (Y) per totum.

7. If lessee for life or years assigns his estate, there needs no consideration, because the assignee is subject to the ancient forfeitures and to payment of the rent, and that a loan is sufficient to vest an use in him; but otherwise in case of a fee-simple; per North Ch. J. Mod. 263. pl. 15. Trin. 29 Car. 2. C. B. in the case of Barker v. Keate.

8. A lease for a year upon no other consideration than reserving a pepper-corn, if it be demanded, is a sufficient consideration to raise a use, and shall operate as a bargain and sale, and so make the lessee capable of a release. 2 Vent. 35. Pasch. 32 Car. 2. C. B. Barker v. Keate. 2 Mod. 249. S. C. adjudged accordingly per tot. Cur.

9. A voluntary settlement may be surrendered without consideration, and such surrender may be aided in a court of equity, and an agreement so to do will be decreed; per Lord Sommers. Ch. Prec. 69. pl. 62. Hill. 1696. Wentworth v. Devergin.

(B) Good and Valuable.

1. **B** Argain and sale, *proviso you pay to me at a future day 100 l.* This, though set down in form of a condition, is as effectual as if formally expressed in the usual terms. Arg. Le. 6. pl. 10. Mich. 25 & 26 Eliz. B. R. in case of Stonely v. Bracebridge.

2. *Love* is not a consideration on which an action may be grounded on a promise to pay money, and the same of *friendship*; per Cur. 2 Le. 30. pl. 35. Trin. 30 Eliz. B. R. Harford v. Gardiner.

Mo. 569.

pl. 777.

Trin. 41

Eliz. B. R.

Fisher v.

Smith, all

the court

were clear,

that if one

pleads a bar-

gain and sale

in which no

consider-

ation of mo-

ney is ex-

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he ought to

supply it by

avermment

that it was

for money,

and the

words (for divers considerations) shall not be intended for money without averment; but if the deed expresses for a competent sum of money, it is sufficient without shewing the certainty of the sum, and none shall say that no money was paid; for against this express mention in the deed, no averment nor evidence shall be admitted to say that no money was paid; and judgment accordingly. — D. 50. b. pl. 8. Marg. cites it as adjudged 8 Jac. to be good, without alleging *pro quadam pecuniæ summa*, and cites 40 Eliz. that if bargain and sale is found by verdict, consideration is intendable. — Bargain and sale is not good if *no consideration* be. Raym. 201. Mich. 22 Car. 2. B. R. Guillems v. Munington.

* [407]

Arg. Cart.

138. cites 1

Rep. 176.

Mildmay's

case.

4. *Other considerations* being but general parlance imply nothing except express considerations were shewn; for otherwise none shall be intended; per Cur. Cro. E. 344. Mich. 36 & 37 Eliz. B. R. in case of Lacy v. Whetstone.

5. An *use* is well raised upon consideration of blood, but the *consideration of blood will not create a debt*, though a deed will, without mentioning any consideration. An *assumpsit to pay A. his cousin 100 l.* is void if there be no other consideration; the reason of the difference is, the land goes to the blood, but so do not the debts. Jenk. 81, 82. in pl. 60.

6. A less consideration will serve to *raise an use* than to *destroy an use*; per Bacon C. 2 Roll. Rep. 106. Trin. 17 Jac. in Canc. in case of Reynolds v. Peacock.

7. The plaintiff intituled himself by a *bargain and sale in consideration of certain articles of agreement*, and does not say for money; and

and for that reason judgment was reversed. Freem. Rep. 344. pl. 427. cites Sty. 188. 204. [Hill. 1649. Watts v. Dixey.]

8. A bargain and sale was *pro diversis considerationibus* generally, and this was admitted in evidence to prove money really paid, and if it be paid by one of the bargainees it is sufficient for all to raise the use to all. Vide if it is paid to one of the bargainees if that be not good also. Clayt. 145. pl. 263. Mich. 1650. Harley v. Thompson.

9. *Conuſee of a ſtatute* extended the land, and in conſideration of 3000l. received by the conuſor, (which was the money due on the ſtatute,) the conuſor conveyed part of the lands abſolutely, and this debt being ſatisfied by ſuch conveyance, the conuſee aſſigned the reſt of the lands to the conuſor, this is a good and valuable conſideration, and is as effectual as if he had been a purchaſor with money. N. Ch. R. 91. 15 Car. 2. Churchill v. Grove.

Chan. Cafes,
35. S. C.—
2 Freem.
Rep. 176.
pl. 237.
S. C. ac-
cordingly.

10. Five ſhillings is a *valuable*, but yet no *equitable* conſideration for a purchaſe of lands. Arg. Chan. Cafes, 34. Mich. 15 Car. 2. in caſe of Moore v. Mayhow.

2 Freem.
Rep. 175.
pl. 235.
S. C. & S. P.
Arg.

11. *Loſs* is as good a conſideration for a promiſe as benefit or profit. Chan. Cafes, 78. Mich. 18 Car. 2. in caſe of Underwood v. Staney.

12. *Marriage* is a good conſideration to make a feme a purchaſor; per Cur. Chan. Cafes 100. Hill. 19 & 20 Car. 2. Douglas v. Wood,

S. P. and
will avoid a
ſecret traſſ.
2 Roll. Rep.
106. per Ba-

con C. Trin. 17 Jac. in Canc. in caſe of Reynell v. Peacock.—See tit. Uſes (E) pl. 2. S. C. and the notes there.—Or a *voluntary conveyance*, though with notice, as the Court inclined, but perſuaded the parties to agree, being near relations. N. Ch. R. 161. Hill. 1 W. & M. Watkins v. Stevens.—And ſo it is though the wife has no portion, and be the ſettlement ever ſo unequal, and in favour of the wife; becauſe it cannot put her in ſtatu quo, or unmarry the parties. 2 Wms.'s Rep. (618) Trin. 1731. by the maſter of the rolls, in the caſe of North v. Anſell.

13. In conſideration *that one was bound for him for money owing, [408]* he did bargain and ſell; this is no good conſideration. But per Hale Ch. J. if there be a *covenant in conſideration of money to convey, and a bargain and ſale purſuant to that covenant*, that will be a good conſideration. Freem. Rep. 344. pl. 427. Trin. 1673. B. R. Tutthill v. Roberts.

14. In *purchaſes* the queſtion is not, whether the conſideration be *adequate*, but whether it is *valuable*; for if it be ſuch a conſideration as will make a defendant a purchaſor within the ſtatute of queen Eliz. and bring him within the protection of that law, he ought not to be impeached in equity; per Finch K. Fin. Rep. 104. Hill. 25 Car. 2. in caſe of Baſſet v. Noſworthy.

15. If one ſeals a *releaſe*, or other aſſurance, to one in poſſeſſion for never to *unequal conſideration*, it ſhall not be relieved becauſe of a *new title diſcovered*, unleſs there be ſome ſpecial fraud; per Ld. Keeper. 2 Chan. Cafes, 161. Paſch. 22 Car. 2. Hobert v. Hobert.

16. A *pepper corn* (in a leaſe ſot a year) if demanded, is conſideration ſufficient for a bargain and ſale to make the leſſee capable of a releaſe, and ſuch reſervation is ſufficient conſideration to *raife a uſe*,

S. C. ar-
gued, Mod.
262.—
S. C. ad-

judged. 2 *a use*, as by bargain and sale. 2 Vent. 35. Pasch. 32 Car. 2. C. B. Mod. 249. *Barker v. Keate*.
 —Freem.
 Rep. 250. pl. 266. S. C. held accordingly.

17. Where there are *several* considerations, and *one is good*, that *will support the whole deed at law*; but it is not so in chancery. Arg. Ch. Prec. 105, 106. Mich. 1699.

18. If an *annuity is granted* by one to his *house-keeper*, with a *bond for payment* of it, and the *bond is lost*, equity will decree payment of the annuity; for *service is a consideration*, and *no turpis contractus* shall be presumed, unless proved. Abr. Equ. Cases, 24. pl. 7. Hill. 1700. *Lightbone v. Weedon*.

Gilb. Equ. Rep. 139. S. C. in totidem verbis, and seems (with many others) to be taken from a manuscript copy of those reports of that great man Mr. Pooley, which are published under the title of *Precedents in Chancery*.
 19. Though a sum of money is mentioned in a deed as the consideration of the grant, a court of equity will *not supply any defect* in such, if *no money was paid* or secured. See Ch. Prec. 475. pl. 298. Mich. 1717. *Furfaker v. Robinson*.

20. Bill for discovery of the consideration of a *promissory note for 275 l.* suggesting that it was given *ex turpi causa* to another and make up a felony, &c. Defendant by his answer *says that he lost such a sum of money, and verily believes that it came to the plaintiff's hands, and that was the real consideration of giving the note, &c.* Per Cowper C. the bill must be dismissed, for there is no equity against the defendant, since he has sworn, and it is not disproved, that he lost such a sum of money, and verily believes that it came to the plaintiff's hands, that is a sufficient consideration to support the note. Bill dismissed with costs. MS. Rep. Mich. 4 Geo. in Canc. *Guiborn v. Fellows & al'*.

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(C) To what it shall extend.

Hard. 395. S. C. in the Exchequer. —Chan. Rep. 275. S. C. —
 Lev. 237. S. C. Pasch. 20 Car. 2. in chancery, decreed accordingly. —S. P. by Lord C. Macclesfield. And he said that the reason is, because it may be very well intended that the husband or his parents would not have come into this settlement, unless all the parties thereto had agreed to the limitation to the brother. 2 Wms.'s Rep. 175. Trin. 1723. in case of *Edwards v. Lady Warwick*.

1. Consideration upon one marriage extended to the *issue of another marriage*. Lev. 150. Mich. 16 Car. 2. in the Exchequer. *Jenkins v. Keymis*.
 2. Covenant in consideration of *marriage of his eldest son, and a marriage portion*, to settle on him in tail the *remainder to the 2d son*. The consideration extends to the remainder to the 2d son, and the conveyance as to the 2d son is not fraudulent against creditors. 2 Lev. 105. Trin. 26 Car. 2. B. R. *White v. Stringer*.

Where there is a marriage portion and a settlement, that part of the settlement only which belongs to the wife, and children by that wife can be esteemed to be founded upon the consideration of that marriage; for it is absurd to imagine that the friends of the wife should be supposed as at all concerned about the remote uses of the settlement upon persons to whom they are entire strangers; and as for the case of *JENKINS v. KEYMIS*, the meaning thereof is no more than this, that a father, when he makes a marriage settlement upon one son, has such a proper, fair, and justifiable opportunity offered him of providing for his other children, as that if he thinks fit to lay hold upon it, by inserting in the settle-

ment

ment provisions for them, such provision shall never be esteemed as fraudulent, and as such set aside in favour of creditors. Per Parker C. 10 Mod. 534, 535. Mich. 11 Geo. 1. in case of *Osgood and Stroud*.— And his lordship cited the case of *Jenkins v. Keymis*, and said, it could not well be intended to have been made to cheat a creditor, unless the person making it was *then in debt*, and that the very remoteness of the limitation to a brother, or to the issue of an after-taken wife, was evident that such limitation was not intended to cheat creditors. 2 Wms.'s Rep. 253. S. C.

3. The wife joins in *opening her jointure* to let in an incumbrance, and bar the estate tail to their heirs male by fine, and declare the uses for securing the money borrowed, then to the husband for life, then to the wife for her jointure, then to the sons of them two in tail, then to the daughters in tail. Per Ld. Somers, the consideration of the mother's joining to bar her jointure, and letting in an incumbrance, might have extended to the daughters and made them purchasers, had it been *so expressed in the deed*; but for want of that, it is only a voluntary gift of the wife to the husband, and the estate to the daughters voluntary, and so a judgment creditor be let in before them. Ch. Prec. 113. Trin. 1700. *Ball v. Burnford*.

4. In a marriage settlement made by the father on the marriage of B. his eldest son, the same was limited to be to the eldest son, and the heirs of his body, in consideration of the marriage * [and marriage portion] remainder to C. the 2d son and the heirs of his body, remainder over. This consideration extends not to the 2d son to make him a purchaser. Chan. Prec. 224. pl. 183. Trin. 1703. *Staplehill v. Bully*.

* So it is in the margin. Ibid.

5. A. cests que trust of lands in fee, on a treaty of marriage between C. then eldest son of A. (B. the first son being dead) and M. in consideration of the said intended marriage, and 600 l. articulated to convey the same to secure 60 l. a year to M. for her life, and 50 l. a year to A. for his life, and subject thereto to the use of C. for life, remainder to his 1st, &c. son of that marriage in tail male, then to provide portions for daughters, remainder to D. a grandson of A. and son of another deceased son of A. in tail male (since dead) without issue, remainder to E. another grandson in tail male, remainder to his own right heirs. M. and B. died without issue. On a bill by E. to compel a conveyance pursuant to the articles, all the precedent estates being determined, Lord C. Macclesfield held that if A. had the whole interest in the estate, and C. B. had nothing, he did not see with whom he could contract unless with M. and her friends, which would only make a good consideration for B. and M. the husband and wife, and their issue, but if each had an interest, so that the one could not make a settlement without the other, and that the above limitations were made upon an agreement on the consideration, and so A. was induced to join therein, equity ought to decree a performance; but said he would give no costs. 2 Wms.'s Rep. 245, 256. Mich. 1724. *Osgood v. Strode*.

This cause was reheard, and affirmed by Ld. C. King, Dec. 1725. Ibid. 257. — 10 Mod. 513. S. C. accordingly by Ld. C. Macclesfield.

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6. Where a settlement is made by the father or other lineal ancestor, in consideration of the marriage of his son, in such case all the remainders limited to his children and their posterity are within the consideration of the settlement; but when it is made by a brother,

Gillb. Law of Uses, 337. S. C. — But where a marriage

settlement is brother, or other collateral ancestor on his marriage, there after the limitations to his own issue, all the remainders limited to his collateral kindred are voluntary, and not within the considerations of the marriage settlement. Per Lord Chan. 9 Mod. 132. Hill. 11 Geo. in Canc. in case of Reeves v. Reeves.

son for life, and then to the wife for life, then to the issue of that marriage in tail, remainder to the fourth son of the husband's father, but the estate tail is spent by death of the husband and wife without issue; upon a bill by the heir at law of the fourth son, Parker C. decreed a settlement pursuant to the articles. But then he did not look upon the plaintiff as a meer volunteer, which he said he must be if there was nothing more in the case than the consideration of the marriage and marriage portion. But he said he went upon a supposition that the estate was neither all in the father, nor all in the son, so that neither could without the other have made this settlement; then it might be very natural to suppose, that this part of the settlement under which the plaintiff claims might be founded on an agreement between father and son; for the father might naturally tell the son, "I must provide for my other children as well as you, and therefore unless you will consent to this, I will not join with you in making this settlement." And in such case the plaintiff must not be considered as a volunteer, but as one claiming under the consideration of the father's doing what he was not bound to do. And this he took to be the state of the case from the evidence, viz. that the father had a power to charge 1200 l. on the estate, which he might depart from upon his eldest son's consent to that part of the settlement under which the plaintiff claims. 10 Mod. 535. Osgood v. Stroud.——2 Wms.'s Rep. 256, 257. Mich. 374. S. C. & S. P.

7. A. had 4 sons, B. C. D. and E.—B. died, and by will bequeathed 10,000 l. to C. and in case he died without heirs male of his body then to D. and E. to be equally divided between them. Afterwards by marriage articles between C. and M. it was agreed that M. should convey the inheritance of lands in S. to C. and M. for life, remainder to the 1st, &c. son in tail male, remainder to C. in fee. In consideration whereof C. covenanted to purchase and settle 250 l. a year on himself and M. for life, remainder to the first, &c. son in tail male, &c. remainder to D. for life, remainder to the 1st, &c. son of D. remainder to E. as before, to D. The marriage took effect. C. died without issue male, and without having made any settlement, and devised all his real and personal estate to M. (whom he made executor), charging the same with portions for his daughters. On a bill by D. and E. for a specific execution, Lord C. King decreed the same, there being no creditor to be hurt, and assets being admitted, and would not put them to bring covenant in the trustees names for recovery of damages, it being uncertain who would be the person intitled to them. And his lordship observed that C. might be induced to covenant as before, to make amends to D. and E. for what was intended them by B.'s will, but could not take place, being a void limitation. 2 Wms.'s Rep. (594.) Trin. [1730] 1731. Vernon v. Vernon.

8. A. in consideration of 6000 l. portion with M. by marriage articles, covenanted with trustees to lay out within one year after the marriage the said 6000 l. and to make it up 30,000 l. in the purchase of lands to be settled on A. for life, remainder to trustees to preserve, &c. remainder for so much as would amount to 8000 l. a year to M. [411] for a jointure, remainder of the whole to the first, &c. son of the marriage in tail male, &c. remainder to trustees for 500 years to raise daughters portions, remainder to A. his heirs and assigns for ever. But if no daughters, then the term to cease for the benefit of A. his heirs and assigns for ever. It was insisted for defendant, that plaintiff was not privy to any of the considerations in the covenant, and so could not

not compel M. to lay the 30,000*l.* out for his benefit. But if he could, that the 1800*l.* a year *lands descended* to him, ought to be *taken as a full satisfaction*. But this point was decreed at the rolls for the plaintiff; and Lord C. Talbot, upon the cause coming on before him, said that the intent seemed to be, that the 30,000*l.* should at all events be laid out in land, the produce whereof was to be secured to the issue of the marriage, who in this case must have taken as purchasers; but as to the remainder in fee he did not think that the looking upon A. either as a purchaser of it or not will vary the case; since, had the covenant been silent, the remainder must have returned to the person from whom the estate moved, and thought it quite the same whether he is considered as a purchaser or as a volunteer, the *dispute not being between the heir and a 3d person, but between the two representatives of A.* the one of *his real*, and the other of *his personal estate*, the heir's being but a volunteer, in regard to his ancestor, will not exclude him from the aid of this court. And decreed the 30,000*l.* to be as real estate, and the plaintiff, though only a collateral heir, to have the benefit of it. Sel. Ch. Cases, in Ld. Talbot's time. 80. 89, 90. Pasch. 1735. Lechmere v. Lady Lechmere.

(D) Where there are several which shall be preferred.

1. **A** Covenant to stand seised was in consideration of *marriage and money*, the consideration of marriage shall be *preferred*; per Plowden. Mo. 93. in pl. 231. Pasch. 12 Eliz. cites it as said by Plowden to have been adjudged in Villers's case, but said it was per Ignem. D. 146. a. pl. 68. Pasch. 4 & 5 P. & M. Villiers v. Beaumont, S. C.

Bendl. 39. pl. 72. S. C.—If an use be declared on a covenant to stand seised on consideration of marriage and money, no use shall arise without marriage, though the money was paid, because the marriage is the principal consideration in the intention of the parties, and the money is accessory only which attends the marriage; per Cur. Mo. 102. pl. 247. Mich. 16 & 17 Eliz.—Cro. J. 624. pl. 7. Mich. 19 Jac. B. R. Arg. S. P. & Ibid. 625. cites a case so resolved, and decree made accordingly in the Court of Wards, 36 Eliz. in a case of Smith and Littleton.

2. *Where there are two considerations, and one is good and one is not good; that which is good be proved it is sufficient, and though he fails in the proof of the other it is not material, because it was in vain to allege it, and it is as if it had not been alleged.* Cro. J. 127. pl. 19. Trin. 1 Jac. B. R. Crisp v. Gamel.

3. *If there be a double consideration alleged for a promise, if one is good and the other not, yet an action will lie on the promise that is broken which was grounded upon these considerations.* Sty. 280. Trin. 1651. B. R. in case of Shan v. Bilby.

For more of Consideration in general, see *Actions*, (Q) (U. 2) to (X), *Wills*, (G. 4), &c. and other proper titles.

Conspiracy.

(A) What is.

F. N. B. 116. (L) a man shall not have a writ of conspiracy for indicting him of felony against husband and wife, because they are but one person; but against husband and wife and a third person it well lies. — The English editions cite S. C. and the new edition cites Stamf. 174.

1. **C**onspiracy against baron and feme and a third person, because they by conspiracy caused N. T. to bring writ against him, because he would not infeoff them of his land, by which he was taken and imprisoned, and acquitted; and because this matter is no conspiracy (for then every man of the law who gives counsel should be a conspirator, and also it is doubted if the baron and feme may conspire) the writ was abated. • Br. Conspiracy, pl. 14. cites 38 E. 3. 3.

Br. Chal-
lence, pl.
134. cites
S. C. —
Fitzh.
Challenge,
pl. 153.
cites S. C.

2. In assise against two who pleaded severally, the one took the tenancy of one parcel to himself, and challenged a juror, and his challenge found and he ousted; and the other said, that he did not challenge him, and prayed that he might be sworn, and the court refused it; for by this means they shall take divers assises upon one original, which they cannot; per Stouffe, if he who challenges and the plaintiff are of one assent to oust the other of his advantages, this might be in case adjudged a conspiracy; quere. How, &c. 99 Aff. 41.

Conspiracy
against two
who pleaded
not guilty,
and the jury
found the one
guilty and
acquitted the
other, by which
the Court
advised them
to go together
again and to
be better
advised, and
so they did;
for one only
cannot conspire,
and then
they found
both guilty,
quod nota.

3. One only cannot be a conspirator; per Gascoign clearly in the written book. Bro. Conspiracy, pl. 12. cites 8 H. 4. 12, 13.

Br. Justifi-
cation, pl. 1.
cites S. C.
— **F. N. B.**
115. (B)
S. P. But
Ibid. (C) if
he conspires
afterwards,
he may be
charged for
the same in
a writ of
conspiracy.

4. Conspiracy against two, that they the Monday, &c. conspired to indict the plaintiff, by which he was indicted and arraigned and lawfully acquitted, &c. and the one said that the Wednesday, &c. he was juror at the sessions to enquire for the king, and informed his company that the plaintiff had done felony, and after, before verdict, he was removed ab eis, and they proceeded and indicted the plaintiff, &c. judgment si actio, &c. For conspiracy does not lie against the indictors, but against the procurors, and the best opinion was that it was a good plea, for though he was discharged before verdict, yet it was well to inform the company, and the act of the court shall not prejudice the party, and also he need not to traverse the day as above. Br. Conspiracy, pl. 1. cites 20 H. 6. 5.

He who
comes into
court and

5. Conspiracy against two by which the plaintiff was indicted of the murder of J. N. the one of the defendants said, that he saw the plaintiff

plaintiff kill the said J. N. such a day; and after the same day that the conspiracy is supposed, the defendant came to E. where the sessions of the peace was held, and informed such a justice of the peace of the matter, and because he was lay he required such a clerk to write his information, who did it; which information is the same conspiracy, &c. judgment si actio, and held no plea, because it was pleaded by one, where the conspiracy supposed by two cannot be a conspiracy by one only, nor e contra, by which he pleaded it for both the defendants; and the best opinion was, that the * plea is not good, for it is no conspiracy, for he did but his duty; for men are sworn to the king in leets to discover felonies and treasons, and in every sessions proclamation is made to make information of felonies and treasons, and also conspiracy is by communication between two at least of the matter to have the party indicted which is of a will preperfed; and here was not any such communication, but information made to the justices. Br. Conspiracy, pl. 4. cites 35 H. 6. 14. 19.

discovers felonies, and is sworn to give evidence to the jury, is not chargeable in conspiracy, F.N.B. 115.(E) and in the notes there (d) cites 27 Aff. 12. 37 Aff. 12. 27 H. 8. 2. & 35 H. 8. 15. * [413]

6. Conspiracy is a consultation and agreement between two or more to appeal or indict an innocent falsely and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men. 3 Inst. 143.

Hawk. Pl. C. 189. cap. 72. cites 3 Inst. 143. but says he cannot but

question the accuracy of that description of conspiracy, and gives his reasons to the contrary.

7. A conspiracy ought to be *falso & malitiose*, otherwise it will not be a conspiracy, and such malice ought to be proved; for if A. travelling on the highway be robbed by B. and he knows not B. if afterwards A. accuses J. S. who is found not guilty, action of conspiracy will not lie against A. For though J. S. was falsely accused he was not maliciously accused, and it may be he took J. S. to be the robber, because he was like B. Per Coke Ch. J. and the Lord Chancellor. Godb. 206. pl. 293. Mich. 11 Jac. in the Star-Chamber, Miller v. Reynolds and Bassett.

8. Conspiracy (to speak properly) lies only for procuring a man to be indicted of treason or felony, where life was in danger; per Holt Ch. J. Ld. Raym. Rep. 379. Mich. 10 W. 3. in case of Savil v. Roberts.

Idid. says, that Treby Ch. J. was of the same opinion in C. B.

9. Several people may lawfully meet and consult to prosecute a guilty person; otherwise, if two charge one that is innocent, right or wrong, for that is indictable; and though nothing be done in prosecution of it, it is a completat and consummate offence of itself; and whether the conspiracy be to charge a temporal or ecclesiastical offence on an innocent person, it is the same thing; agreed per Cur. 1 Salk. 174. Trin. 3 Annæ B. R. The Queen v. Best & al'.

1 Mod. 117. S. C. and per Cur. the gist is the false, conspiring to charge falsely, and indictment lies for the falsehood before

the party is acquitted of it; but case lies not till acquittal, and the indictment in that case being for charging with a bastard-child, the court said that it was an offence too frequent to be quashed upon a motion, and that they would no more quash it than they would for barrety or keeping a bawdy-house.

(B) In what Cases it lies.

Bridgm.
131. Arg.
Mich. 15
Jac. in case
of Agard v.
White, cites
S. C.

1. **I** F two or more conspire against another, and afterwards the conspirators are sworn upon the jury, and they, with others, find a bill against him against whom they conspired, no writ of conspiracy lies against them, because it cannot be intended malicious, because they do it upon their oaths and that with others besides themselves. Stamford Pleas of the Crown, 173. a. (B) lib. 3. cap. 12. cites Pasch. 21 E. 3. 18. Mich. 7 H. 4. 27. Mich. 8 H. 4. 6. & 27 Aff. Fitzh. Conspiracy, 15.

2. J. and T. were indicted, because that they by false alliance and conspiracy between them procured divers persons to indict H. of the death of W. and were thereof arraigned, and the one said, that this H. who killed W. justified the last term and went quit, and the said J. and T. who were indicted and arraigned went quit by judgment, notwithstanding that H. justified; for there it appeared that H. did the fact, viz. killed W. and it is not for J. and T. to know if it was lawfully done or not, otherwise it is where the party is acquitted that he did not do the fact; but otherwise it is here, quod nota. Br. Conspiracy, pl. 26. cites 22 Aff. 77.

3. And also where a man kills another *se defendendo* it shall not be inquired of the abettors; for it was lawful to procure him to be indicted, for he did the fact. Ibid.

4. And so see where a man kills a man *se defendendo*, and is so acquitted, or kills the thief in arresting him, and justifies it upon arraignment upon indictment, and so goes quit, such person shall not have writ of conspiracy; for he did the act, and it is not incumbent on the other to confess in judgment, if it be felony or not; but where the party is acquitted, that he did not do the act, there conspiracy lies, and so see a diversity where he did the act and where not. Ibid.

5. A man shall not have writ of conspiracy against husband and wife for indicting him of felony, because they are but one person; but against husband and wife and a third person it well lies. F. N. B. 116. (L) cites Stamf. 174. and 38 E. 3. 3.

Br. Action
sur le Case,
pl. 23. cites
S. C. —
F. N. B. 116.
(H) cites
S. C.

6. Conspiracy was brought, because the defendant such a day, year and place, by conspiracy, caused certain jurors to present, that 20 acres were given to the plaintiff, prior of S. and his successors, to find a priest to chaunt in such a place, which they did not do, by which the land was seized into the hands of the king by the escheator such a day and year, and remained in his hands till the plaintiff sued it out, &c. to the damage of 300 l. the defendant demanded over of the record of the indictment, & non allocatur. And there it was said, that it is a good plea to say that the manor was not seized, &c. and there by the best opinion this is no cause for the king to seize; for it is not found that it is held of the king, and also the donor may have cessavit, and nothing is mentioned there of mortmain; for it may be before the statute, and there by the best opinion because the king had seized without cause, this action does not lie. Br. Conspiracy, pl. 8. cites 47 E. 3. 15.

7. Where

7. Where the *plaintiff is non-suited after declaration in appeal*, the defendant shall be arraigned upon the appeal, and therefore there if he be acquitted he shall not have conspiracy; for there the acquittal was upon the appeal, and not upon the indictment. Br. Conspiracy, pl. 2. cites 33 H. 6. [1] & 34 H. 6. 9. F. N. B. 114. (E) in the English edit. Marg. cites S. C. & the Marg. of the English editions, says, Note, that this case proves that conspiracy lies as well upon appeal as an indictment, for he is arraigned upon the appeal, cites Stamford, 172. viz. indicted at the king's suit, 19 E. Fitzh. Conspiracy, 12. 5 E. 3. Fitzh. ibid. 22.

8. *But where he is nonsuited before declaration*, there the party shall be arraigned upon the indictment, and therefore there if he be acquitted he shall have conspiracy; note the diversity. Br. Conspiracy, pl. 2. cites 33 H. 6. [1] & 34 H. 6. 9. F. N. B. 114. (E) S. P.

9. *And by the best opinion, where the defendant betakes himself to his clergy after the inquest charged and before the verdict*, or betakes him to his clergy at the commencement, he shall not have conspiracy; for mention of the clergy shall be made in the record, and then he does not suffer verdict upon his arraignment; by the best opinion, and therefore it seems that conspiracy does not lie but where verdict has been given upon the principal; and it was held that the writ was not good, because there is no mention that the principal was imprisoned, quod nota. Br. Conspiracy, pl. 2. cites 33 H. 6. [1] and 34 H. 6. 9.

10. *In divers cases a man shall make another to be indicted*, and yet conspiracy does not lie. Br. Conspiracy, pl. 4. cites 35 H. 6. 14. per Prisot.

11. *As where a man is robbed, and the vill adjoining, by reason of the hue and cry, makes pursuit and takes a man, and carries him to goal, by which he is indicted*, conspiracy does not lie. Br. Conspiracy, pl. 4. cites 35 H. 6. 14. per Prisot. [415]

12. *So where a coroner sits super visum corporis, & it cannot be found who killed the man, there it shall be inquired of the first finders, and they shall be taken by it, and if they say that I. N. did the murder, by which he is indicted and after acquitted*, conspiracy does not lie; for those persons were compelled by the law, quære inde. Ibid. Conspiracy does not lie against a juror or indictor, but against a witness, resolved in the

Star-chamber. 12 Rep. 23. Pasch. 5 Jac. Loyd v. Barkers.

13. *If two conspire to indict me, and do not indict me*, action of conspiracy does not lie. Br. Champerty, pl. 9. cites 9 H. 7. 18. per Keble.

14. *If a felon be pardoned by parliament, and he pleads not guilty*, he shall not have writ of conspiracy; for the felony was gone before by the pardon. Br. Corone, pl. 204. cites F. N. B. Conspiracy. F. N. B. 115. (G).

15. *A writ of conspiracy lieth where 2, 3, or more persons of malice and covin do conspire and devise to indict any person falsely, and afterwards he who is so indicted is acquitted*, now he shall have this writ of conspiracy against them who so indicted him. F. N. B. (D). 3 Inst. 143. cap. 66. in principio, S. P. if the party is lawfully acquitted by the

verdict of 12 men. — But Serjeant Hawkins, in his Pleas of the Crown, 1 lib. 189, 190. cap. 72. very much questions its being requisite that there be a lawful acquittal, and says that it is certain
Vol. V. H h

tain that an acquittal by verdict is not always necessary to maintain such a writ, for it appears by the Register itself, that where one brought such a writ in the usual form, having it in the words *quousque acquietatus fuisset*, &c. against one who had been nonsuited in a malicious appeal of felony brought against him, his writ was abated because such a nonsuit would not make good the words *quousque acquietatus fuisset*, and yet he afterwards brought a new writ, wherein he used the words *quietus recessit*, instead of *acquietatus fuisset*, and recovered; and why may not a new writ as well be formed in any other case, which is as much within the mischief of the statute as this? Hawk. Pl. C. 190. cap. 72. f. 2.

But where A. and B. falsely and maliciously procured J. S. to be indicted of felony, resolved, an action upon the case well lies against one of them; although it was said that for conspiracy the action ought to be brought against two, for one cannot conspire. Cro. C. 239. pl. 22. Mich. 7 Car. 2. B. R. Mills v. Mills.

16. But the writ lieth against two persons at the least who do so conspire; for if one person of malice and false imagination do labour, and cause another falsely to be indicted, the party who is so indicted shall not have a writ of conspiracy, &c. but an action upon the case against him who so caused him falsely to be indicted. F. N. B. 114. (D).

Ibid. in the marg. of the English editions, cites 5 E. 3. Conspiracy, 22. and 13 E. 3. Conspiracy, 25. and says that the abettors shall not be inquired of, but where the abetment is found by inquest. 19 H. 6. 19. and 4 H. 6. 23. Nul tiel record is a good reply in conspiracy.

17. If two conspire to cause a man to sue an appeal against another of felony or murder, without any indictment taken or found thereof, and afterwards the defendant is acquitted by verdict, he shall not have a writ of conspiracy against those who conspire to appeal him; because that by the statute Westm. 2. cap. 12. quia multi per malitiam, &c. it shall be inquired of abettors, if he be not indicted thereof; and if they be found he shall have scire facias against them out of the same court where he is acquitted, to answer him his damages. F. N. B. 114. (F).

Nor shall one have conspiracy if he be indicted or appealed, and arraigned and acquitted on the appeal. 33 H. 6. 2. Yet note, a monk was appealed of robbery and acquitted; he and his abbot shall have a writ of conspiracy, though he was acquitted by verdict, &c. 24 E. 3. 73. The reason is, for though the abbot, though not party, shall have a scire facias for the default of the party on the original. F. N. B. 114. (F) in the new notes there (a).—

Ibid. in the new notes there (b) says, see 13 E. 3. Conspiracy, 25. 27 E. 2. Ibid. 26. Ratio, because the writ is given on a nonsuit in appeal, and for that there is an inquiry of the abettors.

* [416]

19. If the action be brought against divers, and all but one are acquitted, the action fails. 28 Aff. 12. So if all but one are discharged by matter in law. F. N. B. 114. (D) in the marg.

Ibid. in the new notes there (d) cites 27 Aff. 32. 27 H. 8. 2. 37 Aff. 12. and 35 H. 8. 15.

20. He who comes into court, and discovers felonies, and is sworn to give evidence to the jury, is not chargeable in conspiracy. F. N. B. 115. (E).

Ibid. in the new notes there (a) says see 27 H. 8.

21. A man shall have a writ of conspiracy upon an indictment before any mayor, bailiff of any city or borough, who have gaol deliv- very within the city or borough, if he be acquitted before them, &c. For

For that acquittal discharges him * of the felony. But a writ of conspiracy does not lie against the indictors [themselves], &c. F. N. B. 115. (B), (C).

2. 12 E. 4.
17. 7 H. 4.
1. 21 E. 3.
47. 21 E.
4. 1. and 8 H. 4. — * [So is the French edition.]

22. Conspiracy against two, one is attainted, the other makes default, judgment shall be against him. 24 E. 3. 34. but quære by Stamford, 174. for, 27 E. 3. it is holden that one shall not answer without the other. F. N. B. 115. (F) Marg.

23. The justices of gaol delivery arraigned a prisoner within the year, where an appeal is depending against the same prisoner for the same murder, which they know [is shewn to them], and yet they proceed and acquit him, he shall have conspiracy, although he was not acquitted nor discharged of the appeal. F. N. B. 115. (H).

It seems sufficient if the writ be delivered to the sheriff, who opens it and reads it to

the justices; but if they have no notice, it is clearly no plea. Ibid. in the new notes there (b).

24. If a man be indicted or appealed of treason or felony, or a trespass done in a foreign county, &c. if he be acquit thereof, he shall have a conspiracy against him who procured him to be indicted or appealed, and shall recover treble damages by the writ upon the statute of 8 H. 6. cap. 10. F. N. B. 115. (I).

Kelw. 21.
a. b. pl. 7.
Hill. 12 H.
7. Bigot v.
J. S. the
S. C. the
Court held,

that he who would have advantage upon this statute, ought to have action on his case on the same statute; for such action is expressly given thereby.

25. If a man be indicted of felony or treason where there is not any such place within the county, he shall have conspiracy, and recover his damages against the abettors, or procurors, or conspirators, by the statute of 18 H. 6. cap. 12. F. N. B. 115. (K).

26. There are divers writs of conspiracy grounded upon deceit, and trespass done unto the party, which are properly actions of trespass upon the case; as if two men do conspire to indict another man because he did not arrest a felon who passed by the town of N. and [for this] they caused him to be indicted and amerced in the leet of R. and F. and took and imprisoned him for that amercement until he be acquitted in the said leet. F. N. B. 116. (A).

Finch. 306.
cap. 15. S. P.

27. And if men say and affirm unto A. that he has right unto such land, and procure him to sue against B. who is tenant of that land, &c. by which B. is compelled to sell other lands for the defence of this land, &c. now he shall have an action against those who procured or conspired to cause A. to bring his action, &c. F. N. B. 116. (B).

Finch. 306.
cap. 15. S. P.
— F. N. B.
116. (B) in
the new
notes there
(a) says, see
contra 38 E.

3. 3. and that he ought to shew in his writ who sued the action.

28. And if 2 men procure one to be indicted for hunting in another's park, for which he is taken, imprisoned, and put to charges, until he has acquitted himself of the trespass, he shall have a conspiracy against them. F. N. B. 116. (C).

[417]
Finch. 306.
cap. 15. S. P.

29. Conspiracy shall be maintainable against those who conspire to forge false deeds, which are given in evidence, by which his land is lost. F. N. B. 116. (D).

Conspiracy.

30. Conspiracy shall be maintainable against those who conspire to bring an assise in the name of the plaintiff against a defendant, and to make one attorney for the plaintiff, in which assise the plaintiff was found villain, &c. now he may bring his writ of conspiracy. F. N. B. 116. (E).

This is wrong translated, and should be (made a presentation in

the name of the plaintiff to an advowson, and thereby presented one unto the bishop, &c.].

31. Conspiracy shall be maintainable, because the defendant made one to present in the name of the plaintiff unto an advowson, and for that presenting unto the bishop who is admitted and instituted, &c. F. N. B. 116. (G).

32. A writ of conspiracy for indicting him of felony does not lie but against two persons at the least, but a writ of conspiracy for indicting one of trespass, or other falsity made, as in the cases aforesaid, lies against one person only. F. N. B. 116. (K).

9 Rep. 55. b. S. C. states it as a combination among the poulterers to charge S. (who had married the widow of a poulterer in Gracechurch-street) with a robbery, and the defendants were sentenced by fine and imprisonment.

But in this case three things are to be observed, 1st, That a felony be done. 2dly, That he that doth arrest, hath suspicion upon probable cause, which may be

pleaded, and is traversable. 3dly, That he himself, who hath the suspicion, arrest the party; for he cannot command another to do it; because suspicion is a thing individual * and personal, and cannot extend to another than to him that hath it. 12 Rep. 91. Mich. 9 Jac. Sir Anthony Ashley's case.

* S. P. by Coke Ch. J. Mo. 817. pl. 1115. in a note at the end of S. C.

And per Crooke J. Ibid. 151. If a man indicts another upon probabilities, and

35. If you will charge one merely upon suspicion, without other probabilities to warrant it, this is a clear conspiracy; but otherwise where there are good and seeming probabilities; they should not say that he is the same party, for if it prove not so, then it is plain malice; or if the justice of peace, upon his examination, finds

finds not such matter upon which to commit him, notwithstanding which the party prosecutes an indictment against him, and he is acquitted, an action of conspiracy lies, for it is malice apparent; per Fleming Ch. J. Bull. 150. Trin. 9 Jac. in case of Wale v. Hill.

relies upon the probabilities, and the party indicted be acquitted, an action of

conspiracy will not lie; the suspicion must be his own, and not the suspicion of others; but judgment was not given, because the court was not full, and the parties were upon agreeing. *Ibid.* Wale v. Hill.

36. Articles were entered into between A. and C. in trust for J. S. wherein C. covenanted to procure witnesses to convict A. of having poisoned one R. 16 years before, and that C. should have a sixth part of what should be forfeited by A. and the rest was to be in trust for J. S. and the widow of the said R. who were to swear, that he, being A.'s servant, saw him put poison in a cup of liquor, and commanded the said J. S. to carry it to R. which he did, and that R. drank it, and died immediately; and it was proved, that B. offered J. S. to get his pardon, if he would accuse A. and himself also, &c. and for this conspiracy B. was fined 1000 l. and imprisoned, and some of the defendants were sentenced to the pillory, and to be burnt in each cheek with the letters F. and C. signifying a false conspirator, and some were fined, pilloried, and imprisoned, and the lord chancellor cited several precedents of censures, and said, that the malice and corruption in these accusations ought to be apparent, and though an ignoramus is found, yet the party is finable for such conspiracies, and so he is if the bill is found, though the defendant be legitime acquietatus. Mo. 816. pl. 1105. Mich. 9 Jac. in the Star-chamber, Sir Anthony Ashley's case.

12 Rep. 90. S. C.

37. A bare conspiracy to do a lawful act to an unlawful end is a crime, though no act was done in consequence thereof; per Cur. 8 Mod. 321. Mich. 11 Geo. 1. The King v. Edwards.

(C) Actions for it.

1. A Man cannot have action upon the statute of procurement of false indictments till he be *legitimo modo acquietatus* by the statute of *Westm. 2. cap. 36.* which speaks of procurements of such indictments against a man who dwells in another county for vexation. Br. Action sur le Statute, pl. 44. cites 8 E. 4. 5.

2 Inst. 445. Ld. Coke, in his commentary upon the words of this statute, viz.

that such plaints were moved against the party maliciously by the solicitation or procurement of the sheriffs, or other bailiffs, or lords, the replication shall be admitted, &c. says it is to be observed, that the procurement is the substance, and implies that it was done maliciously, and therefore if the jury find the procurement, and that it was not done maliciously, yet the court shall adjudge it done maliciously, because it appears so to them judicially.

2. Conspiracy against two for causing the plaintiff to be falsely indicted in a foreign county contrary to the statute of 8 H. 6. [10.] And per Fairfax J. this action upon this statute may be brought against one alone, and so of writ of conspiracy founded upon writ of trespass; but upon indictment of felony conspiracy shall be brought against two at least, for this is an action founded at common law. Br. Conspiracy, pl. 38. cites 11 H. 7. 25.

H h 3

3. Where

3. Where two conspire *to indict one falsely*, and the party is not indicted, because the jury had not sufficient evidence, but returned an *ignoramus* upon the bill, no conspiracy lies, because he never was indicted * nor acquitted, yet he may be indicted upon conspiracy at the common law; so if any commit perjury, which is not punishable by the statute of 5 Eliz. yet he may well be indicted thereof, and punished by fine and imprisonment. Cro. J. 8. pl. 9. cited by Popham as resolved by all the justices 16 Eliz. Sydenham v. Keilaway.

4. Action upon the case in nature of a conspiracy lies not against any who *prefers an indictment and swears it to be true*; for it is for the king and the commonwealth, and if it should be allowed no indictment would be preferred. Cro. E. 724. pl. 19. Mich. 41 & 42 Eliz. B. R. Sherington v. Ward.

Mo. 813.
pl. 1101.
S. C. in the
Star-cham-
ber, but
S. P. does
not appear.
—Mo. 817.
at the end of
pl. 1105.
Mich. 9
Jac. in the

5. Conspiracies punishable by law *before they are executed* must have four incidents; 1st, They must be *declared* by some manner of prosecution, or by making bonds or promises to one another. 2dly, They must be malicious, as for unjust revenge, &c. 3dly, They must be *false* against an innocent person. 4thly, They must be out of court *voluntarily*; in a nota of the reporter. 9 Rep. 57. a. Mich. 8 Jac. in the Poulterer's case, alias Stone v. Walters & al'.

Star-chamber, says, Nota, 1st, That in these accusations there ought to appear apparent malice or corruption. 2dly, That though an *ignoramus* be found, yet the conspiracy is finable here. 3dly, That though he be *legitimus acquietatus*, yet he is finable in the Star-chamber.

6. A conspiracy of any kind is illegal, though the *matter, about which* they conspired, might have been *lawful* for them to do if they had not conspired to do it. 8 Mod. 11. Mich. 7 Geo. in case of the King v. Journeyman Taylors of Cambridge.

(D) Conspiracy. In what Cases Accessary shall have Conspiracy.

F. N. B.
115. (A)
S. P. and
that the ac-
cessary shall
have a writ
of conspi-
racy.

1. *TWO* were indicted, the one as principal the other as accessary, and the principal was arraigned and acquitted, by which the accessary brought writ of conspiracy, and it was doubted if he shall recover, because his life was never in jeopardy; for by the acquittal of the principal the accessary is acquitted and shall not be arraigned; but because he is *legitimo modo acquietatus* by the acquittal of the principal, therefore he shall recover his damages, quod nota per judicium; for his life was in jeopardy in this manner. For if the principal had been found guilty they ought to have inquired further of the accessary if he had appeared. Br. Conspiracy, pl. 2. cites 33 H. 6. [1] & 34 H. 6. 9.

F. N. B.
115. (A) in
marg. S. P.
—Ibid.
(F) S. P.

2. But if the principal dies before he be attainted or outlawed, or gets a charter of pardon before his attainder, the accessary shall not have conspiracy, for his life was never in jeopardy; for his principal was never arraigned. Ibid.

3. If

3. If a man cause one as principal to be appealed of felony or murder, and another as accessory to him, and afterwards is *non suit in his appeal*, the accessory shall have a writ of conspiracy as well as the principal. F. N. B. 115. (A).

* (E) Writ and Count.

1. **I**N writ of conspiracy brought against defendants for *forging of a false release, by cause of which release given in evidence, a verdict passed against the plaintiff, so that he lost a ward, &c.* but he did not suppose by the writ that judgment was given against him upon this verdict, but he shewed it in his count; yet the writ abated. Thel. Dig. 87. lib. 9. cap. 7. f. 26. cites Pasch. 39 E. 3. 16.

2. In conspiracy against baron and feme and others, notwithstanding that the feme cannot conspire with her baron, and that the writ ought to abate for this cause against them, yet it shall stand against the others. Thel. Dig. 236. lib. 16. cap. 10. f. 26. cites Pasch. 40 E. 3. 19. Quære.

3. In conspiracy the writ was, that the defendants procured one W. to oust the plaintiff of his land, and to infeoff one B. thereof, against whom one E. ought to have sued a *scire facias*, &c. and held good enough, and pursuant, notwithstanding that it comprehended quasi two procurements. Thel. Dig. 106. lib. 10. cap. 15. f. 11. cites Hill. 43 E. 3. 10.

4. And a man may have several matters in writ of conspiracy. Thel. Dig. 106. lib. 10. cap. 15. f. 11. cites 47 E. 3. 15.

5. In writ of conspiracy, for that the defendant caused by conspiracy a presentment to be made that certain land was given to find a chaplain to chaunt in such a chapel annually, which had not been done by ten years, &c. where the record of the presentment was to find a perpetual chauntery, &c. yet the writ was adjudged good. Thel. Dig. 77. lib. 9. cap. 1. f. 9. cites Mich. 47 E. 3. 15.

Fitzh. Conspiracy, pl. 18. cites S. C. — Br. Action sur le Case, pl. 23. cites S. C. that by such false

office, the plaintiff's manor was seized into the king's hands, and that he sued it out ad damnum 400 l. and says it seems there that action on the case lies for such offence. — Br. Conspiracy, pl. 8. cites S. C. by the best opinion, because the manor was not found held of the king, and nothing is said of mortmain (for it might be before the statute), and the donor might have had cessavit, and so the king had seized without cause, it was held that this action did not lie.

6. Though several matters are in writ of conspiracy, and one of them be false, yet the writ is good enough for the others. Thel. Dig. 238. lib. 16. cap. 10. f. 66. cites Mich. 47 E. 3. 15.

7. In conspiracy [the plaintiff] declared that the defendants conspired such a day in C. and S. and the defendants were awarded to answer; for a man may conspire in two villis at one and the same day, by which the defendants were compelled to answer. Br. Conspiracy, pl. 20. cites 22 H. 6. 49.

8. In conspiracy by the accessory, where the principal was acquitted, no mention was made in the writ that the principal was imprisoned, and held a good exception. Thel. Dig. 95. lib. 10. cap. 6. f. 18. cites Hill, 33 H. 6. 2.

Theil. Dig.
100. lib. 10.
cap. 9.
f. 24. cites
S. C.

9. Conspiracy that the plaintiff was *indicted and acquitted at D. before such justices*; the defendant pleaded to the writ, because he did not say at D. in the same county, & non allocatur; for it shall be intended to be in the same county, unless the contrary be shewn. And in trespasss quare clausum fregit apud D. he need not say apud D. in the same county; for it shall be intended to be in the same county. Br. Conspiracy, pl. 37. cites 35 H. 6. 46.

Ibid. 114.
(G) S. P.
but wherethe
conspiracy
is founded
upon a non-
suit of the
plaintiff, the
writ in the
end shall say,
Quousque idem
querens per considerationem Curie nostrae inde quietus recessit.

10. If the *principal* and one, who is *accessary*, be *indicted of felony*, and be taken and arrested, the *principal* is *indicted and acquitted*, now by that the *accessary* is discharged, and the *accessary* thereupon shall have a writ of conspiracy against those who conspired to indict him, and * the writ in the end shall say *quousque idem (the principal) secund' leg', &c. acquietat' fuisse & idem (the accessary) quietus recessit.* F. N. B. 115. (A).

* [421]

11. If a writ of conspiracy be brought *against two*, then it shall be said properly a writ of conspiracy; but if it be brought *against one* person only, then it is but an action upon the case upon the falsity and deceit done; because one person cannot conspire with himself. F. N. B. 116. (L).

12. The writ ought to be brought in the county where the conspiracy was made, and not where the indictment was, or where the deed was done, &c. F. N. B. 116. (M).

13. In conspiracy the matter must be laid to be falsely & maliciously; per Richardson Ch. J. Godb. 445. pl. 511. Mich. 4 Car. in the Star-Chamber. Taylor v. Towlin.

(F) Pleadings.

F. N. B.
115. (E) in
the new
notes there
(b) has the
same quære,
and cites 47
E. 3. 16.
12 E. 4. 67.
that they shall not, 27 Aff. 12. — And another quære, if the jurors procure themselves to be impanelled. Ibid. cites 9 H. 4. fol. ult.

1. IF two conspire to indict another, and after they are of the jurors, and indict him; it is a good plea in conspiracy that they were two of his indictors; and per Green it is a good replication that they conspired before, and afterwards were of the inquest by their own procurement, and indicted him. Quære, for it was not adjudged. Br. Conspiracy, pl. 15. cites 21 E. 3. 17.

S. P. in
Mainte-
nance,
Heath's
Max. 107.
cap. 5. cites
S. C. —
S. P. Br.
Traverse
per, &c.
pl. 171. cites 7 Aff. 12. [but it should be 27 Aff. 12. and so are the other editions]. — F. N. B. 115. (E) S. P. and the new notes there (d) cites S. C.

2. Conspiracy against several, where the plaintiff was by their labour indicted of felony, &c. and after was acquitted, one said that he was justice by commission, and informed the inquest, absque hoc that he was guilty before, and another said that he was one of his indictors, and a good plea without traverse, and another said that he was sworn to inform the inquest, and to indict him, and no plea. Br. Conspiracy, pl. 27. cites 27 Aff. 12.

3. Conspiracy against four, three pleaded to issue, and the fourth pleaded matter in law, and after the three were acquitted, by which the fourth prayed to go quit, because one alone cannot conspire, by which he went quit; quod nota. Br. Conspiracy, pl. 29. cites 28 Aff. 12.

4. In writ of conspiracy it is a good plea that the defendants were indictors of the plaintiff, and that which they did was by force of their oath; judgment, &c. And if this be found by the record of the indictment they shall go quit; quod nota. Br. Conspiracy, pl. 30. cites 30 Aff. 21. F. N. B.
115. (E)
S. P.

5. Conspiracy against three, supposing that the three procured one of the three to oust the plaintiff, and the defendant R. against whom B. should sue scire facias of a prior right, so that the plaintiff should lose his warranty. Belk. demanded judgment of the writ; for it is that the three procured one of them, and yet non allocatur; for the two may procure the third, and so well, by which he pleaded not guilty. Br. Conspiracy, pl. 5. cites 42 E. 3. 1. [422]

6. And see 43 E. 3. 9. that the procuring to oust the plaintiff and the defendant R. and that B. should sue scire facias, &c. which are two matters, is not vicious; for the one is not cause alone by itself, and the one is accessory to the other, by which he pleaded to the writ, because though he lost in scire facias, yet he may have a writ of right, therefore judgment of the writ, & non allocatur. But quære if the writ lies, because though the defendant procured as above, yet if the act was not done the action does not lie. Br. Conspiracy, pl. 5. cites 42 E. 3. 1.

7. Conspiracy against three, because they conspired to indict the plaintiff of a rape of N. P. and taking her goods to the value of 10 l. till he was acquitted, &c. Tanks, demanded judgment of the writ, because he did not shew what goods they were, & non allocatur; for it was according to the indictment, and as to one he said that he was one of the indictors, and to another that he was hundredor of the hundred, and before him the indictment was taken, and so as judge & non allocatur, unless he was judge by commission. Belk. said they conspired before the indictment, and yet held that it does not lie against them; quære. Br. Conspiracy, pl. 9. cites 47 E. 3. 16.

8. Conspiracy against several, one justified as bailiff to return panel, and after was sworn to say what he knew of the matter; judgment, &c. and the others said that they were sworn upon the indictment, and held that the juror is excused though the plea of the bailiff be not good, yet one only cannot be a conspirator; per Gascoigne clearly in the written book. Br. Conspiracy, pl. 12. cites 8 H. 4. 12, 13.

9. In conspiracy the defendant said that he was one of the plaintiff's indictors, and sworn before the justices of peace, and shewed whom, &c. before whom he was indicted, &c. Judgment is actio, and a good plea, by which the other said that no such record, and the defendant failed of the record at the day, &c. Br. Conspiracy, pl. 22. cites 4 H. 6. 23. Br. Failer de
Record, pl.
3. cites S. C.

10. Conspiracy against three for indicting the plaintiff, Gorse said the day, year and place, in the declaration, the inquest was charged before

Conspiracy.

fore the justices for the king, and E. D. Defendant was there with his eye cut, and his tongue cut, and the justices swore him to give evidence for the king, and he demanded counsel of the other two what to do, and they counselled him to do according to the command of the justices, and he did it, which is the same conspiracy, &c. Judgment, &c. Quære. Br. Conspiracy, pl. 16. cites 7 H. 6. 13.

11. It was agreed, that in conspiracy of an indictment, it is a good plea that *nul tiel record* of indictment quod nota. Br. Conspiracy, pl. 36. cites 9 H. 6. 26.

12. In conspiracy it is a good plea that the defendant *was one of his indictors*, and pleads certain, judgment si actio; and a good replication that *no such record*. Br. Conspiracy, pl. 17. cites 19 H. 6. 19.

13. In conspiracy the writ *was cepit* for *cepisset*, and yet well. Br. Conspiracy, pl. 18. cites 19 H. 6. 34.

14. And if one writ of conspiracy be *purchased pending another writ of the same conspiracy*, yet it shall not abate; for several conspiracies may be in one and the same day, and therefore he pleaded not guilty. Br. Ibid.

S. P. by Newton. because they do not agree in the day. Br. Traverse per, &c. pl. 315. cites 20 H. 6. 5. 33.

15. In conspiracy the defendant *justified at another day*, and the opinion was, that he shall say, *absque hoc that he is guilty of any conspiracy before or after*; but it was not adjudged. Br. Traverse per, &c. pl. 361. cites S. C. — Heath's Max. 106. cap. 5. cites S. C. — But in 12 E. 4. 18. the defendant justified as a justice of the peace, and instructed the jury at another day *absque hoc that he was guilty before*. Br. Traverse per, &c. pl. 315.

[423] 16. If a man be *indicted*, and the party *sues appeal*, and he is arraigned upon the appeal, and the defendant is *acquitted*, he shall not have conspiracy, nor shall recover any damages against the plaintiff; because where the defendant is indicted the jury upon the appeal shall not inquire of abettors, per Danby, quod tota Curia concessit; for the acquittal was upon the appeal and not upon the indictment. Br. Conspiracy, pl. 2. cites 33 H. 6. & 34 H. 6. 9.

17. In conspiracy, the one *pleaded not guilty and the other justified*, and traversed *absque hoc*, that he was *guilty after such a day*, nota. Br. Conspiracy, pl. 3. cites 34 H. 6. 14.

18. It was agreed, that to say that *he who was killed was his cousin or servant*, or that the common fame was that the plaintiff killed him, are good matters of plea in conspiracy. Br. Conspiracy, pl. 4. cites 35 H. 6. 14.

19. Conspiracy in B. R. the one of the defendants demanded judgment of the writ; for he said, that where the plaintiff has supposed that he conspired to indict him of certain felony, he said, that there is a record of indictment in which the plaintiff and R. D. and J. C. are indicted of the said felony, *absque hoc that there is any record of indictment which supposes that the plaintiff only did the felony*, and yet the writ was awarded good; for it was said, that *felony is several and not joint, and the indictment is in itself a several indictment against every one of them*. Br. Conspiracy, pl. 32. cites 6 E. 4. 4.

20. Where

20. Where a man is indicted and the indictment is insufficient, and he does not take advantage of it, but pleads not guilty and is acquitted, and brings writ of conspiracy, it is a good bar to say that the indictment was not sufficient, so that he was not duly arraigned. Br. Conspiracy, pl. 23. cites 9 E. 4. 12. Per Littleton, quod non negatur.

21. If twenty are indicted, and one of them brings writ of conspiracy, supposing that the defendants conspired to indict him, it is no plea that there is a record that he and others are indicted, and not that he only is indicted; quod nota. Br. Conspiracy, pl. 24. cites 9 E. 4. 23.

22. Conspiracy against J. Jenny and others of conspiracy made the first day of August, by which he was indicted the 4th day of August, before J. Jenny and other justices of peace; and that after he was acquitted, and for J. Jenny it was said, that this same J. Jenny defendant, and J. Jenny justice of peace, was one person and not divers. And, per Billing, you ought to shew how he meddled as justice of peace; by which he said, that the bill was delivered to him, and he read it to the jury, and commanded them, if it be true, to find it, and otherwise not, absque hoc that he is guilty of any conspiracy before the said 4th day of August, & adjournatur. Br. Conspiracy, pl. 33. cites 12 E. 4. 18.

23. Conspiracy against two, the one came and pleaded the death of the other pending the writ, and no plea per Cur. for it may be found that he and the other conspired, and then well. Br. Conspiracy, pl. 34. cites 18 E. 4. 1.

24. In a conspiracy against two, one pleaded to the writ, and the other matter in law, which is adjudged for him, and the plea unto the writ found by verdict against him who pleaded unto the writ, the plaintiff shall have judgment against him who pleaded to the writ. F. N. B. 115. (E).

Ibid. in the new notes there (e) says see 14 H. 6. 15. accordant, for it may be a conspiracy.

25. But if both had pleaded not guilty, and one had been found guilty and the other not, there the plaintiff shall not recover, for then he did not conspire as is supposed by the writ. But it may be that they did conspire in the case aforesaid, although the matter in law be adjudged for the defendant. F. N. B. 115. (E).

Ibid. in the new notes there (f) says, see accordant 33 H. 6. 1. 8 E. 3. 17. 8 H. 6. 1.

28 Aff. 12. 11 H. 4. 2. But if one be found guilty, and the other make default, 24 E. 3. 73. or be dead, 18 E. 4. 1. there he shall have judgment against the one, though he had released to the other. 22 R. 2. Brief, 888.

26. Conspiracy; the defendant pleaded his goods were feloniously stolen, and he found them in the possession of the plaintiff, for which he indicted him, and gave evidence against him, and upon the trial the plaintiff was acquitted, and traversed that he conspired aliter vel alio modo. Adjudged a good justification, because the finding of the goods in his possession was a sufficient cause of suspicion. Mo. 600. pl. 828. Pasch. 36 Eliz. Varrel v. Wilton. [424]

27. In an action upon the case in the nature of a conspiracy for procuring him to be indicted for supposed robbing of him, the defendant

defendant justified, and in this his justification shewed how that he was robbed by persons to him unknown, and that one of them was upon a brown horse, and had a white cloke, and was like unto the plaintiff, and upon this he complained unto Gawdy J. who upon his examination finding cause to suspect him, did commit him and bind him over, &c. and he did likewise bind the defendant for to prosecute against him, the which he accordingly did, and the jury did acquit him, and so justified. To this justification the plaintiff demurred in law, and this was ruled to be a good justification. Bulst. 150. Arg. cites 42 Eliz. B. R. Paine v. Rochester.

28. S. C. thus, viz. Two persons were robbed, and afterward one of them seeing J. S. suspected him to be one of the robbers who was on a brown mare, and upon acquainting the other of it he suspected him also, and thereupon got a warrant to bring J. S. and examine him, but he hearing of it *absented himself*, but afterwards was taken and committed to gaol by justice Gawdy, who advised them to indict J. S. of the robbery; J. S. was indicted and acquitted, and brought action of conspiracy against the two; but the court held that the causes of suspicion and J. S. his absenting himself are causes sufficient. Cro. E. 871. pl. 7. Hill. 44 Eliz. B. R. Paine and Rochester v. Whitfield.

(G) Where the Indictree, &c. shall be said Legitimo modo Acquietatus.

1. **H. B.** brought writ of conspiracy against the Id. of T. E. D. and others, *because they conspired to indict him at B. in the county of W. of the death of J. P. by which he was indicted of it at H. in the county of H. before certain justices, &c. by which he was taken and imprisoned till he was arraigned upon it and lawfully acquitted at H. in the county of H. before certain justices, &c. and the defendant protesting that he did not conspire, pro placito dicit, that the same day that the plaintiff was arraigned upon the same indictment, A. who was the feme of this same J. P. came before A. B. justices of gaol delivery, before whom the plaintiff was arraigned within the year after the death of her baron, and delivered to one B. sheriff of the same county, writ of appeal brought by her of the death of her husband, which R. notified and read the writ to the same justices, and notwithstanding this, the said plaintiff was arraigned and acquitted, judgment &c. and there it was agreed, that by the delivery of habeas corpus, certiorari or superseas, the court shall surcease. And per Newton and Paston justices, this is not sufficient notice; for the writ is directed to the sheriff, and he broke it, and shewed it to the justices, and they did not see it sealed, so that it is not but an escrow to them, and therefore they did well to arraign the defendant; but if they had sufficient notice, they ought not to have arraigned him at the suit of the king pending the appeal, contra where they have not notice; and then no plea; by which the defendant pleaded not guilty. Br. Conspiracy, pl. 19 H. 6. 28.*

(H) Indictment, or Information.

1. **H.** *Killed W. in taking him in arrest for felony, because W. stood to his defence, and would not render himself to the peace, and I. and T. procured H. to be indicted of the death of the same W. by which he was apprehended and arraigned of it, and justified as above and went quit, but the said I. and T. who caused him to be indicted, shall not be punished as conspirators, because H. did the act, viz. killed W. and it is not as to I. and T. adjudged if this be felony or not, quod nota.* Br. Corone, pl. 89. cites 22 Aff. 77.

2. Indictment of conspiracy wanted the year, day, and place where it was done, and was of imprisonment of certain persons till they should make fine, &c. where this sounds in oppression and not in conspiracy, and because they condemned him it was reversed by writ of error. Br. Office del. &c. pl. 5. cites 24 E. 3. 74.

3. If an indictment of conspiracy be laid for a rape, it must be laid that there was *recens prosecutio* of it, otherwise it will argue a consent, and because the rape was concealed for half a year, an indictment brought afterwards is *false and malicious*. Per Richardson Ch. J. Godb. 444. pl. 511. Mich. 4 Car. in the Star-Chamber. Tailor v. Towlin.

4. An indictment for conspiring to charge another with being the father of a bastard child is good. For per Cur. though the offence (as was objected) is spiritual, yet this court has cognizance of every unlawful act, by which damages may happen to the party as here they may by his being liable to maintain the child. Sid. 68. pl. 3. Hill. 13 and 14 Car. 2. B. R. Timberley v. Child. Lev. 62. Pasch. 14. Car. 2. B. R. The King v. Kimberty and Mary North, S. C. and held the indictment lies for the bare conspiracy, without indictment or any other act done. — Keb. 203. pl. 7. Child v. North and Timberley. S. C. adjudged for the plaintiff, nisi. — Ibid. 254. pl. 25. The King v. Timberley, S. C. adjudged pro rege. — S. C. cited Arg. 8 Mod. 320. — S. C. cited Arg. 2 Ld. Raym. Rep. 1169. — S. P. Vent. 304. Hill. 28 and 29 Car. 2. B. R. The King v. Armstrong & al'. — S. C. cited 2 Ld. Raym. Rep. Arg. 1169. — 6 Mod. 100. Hill. 2 Ann. B. R. Holt Ch. J. agreed that a conspiracy to charge one with a bastard-child is indictable; but the advising another to do it without more is not. — S. P. adjudged, 2 Ld. Raym. Rep. 1167. Trin. 4 Ann. The Queen v. Best. — 1 Salk. 174. S. C. — 6 Mod. 185. S. C. adjudged. — 11 Mod. 55. pl. 31. The Queen v. Bais, S. C.

5. Indictment against the defendant at the sessions for the county of Devon, for that he being an evil man, &c. and conspiring to aggrrieve one Laud, pretended he had broke his arm, and accordingly counterfeited the same; and upon that pretence refused to seek his living by any labour, and exhibited a complaint against him to the justices of the peace, &c. and it was quashed upon motion, as a matter not indictable. 2 Show. 456. pl. 421. Mich. 1 Jac. 2. B. R. The King v. Salter.

6. A conspiracy that none [of them] should buy coffee of B. was said Arg. not to be indictable if nothing more be done; but Holt Ch. J. denied it. 6 Mod. 99. Hill. 2 Ann. B. R.

7. And so it was said Arg. that a confederacy to way-lay a man and kill him or rob him, would not bear an indictment; but Holt Ch. J. denied it. 6 Mod. 99. Hill. 2 Ann. B. R.

8. A

8. A confederacy falsely *to charge another with a thing that is a crime by any law* is indictable, and the confederacy is the gist of the indictment. Per tot. Cur. 6 Mod. 187. Trin. 3 Ann. B. R.

[426] 9. Several *journey-men taylor*s were indicted for a conspiracy among themselves *to raise their wages*. The court held that this indictment need not conclude *contra formam statuti*, though by stat. 7 Geo. 1. cap. 13. journey-men taylor>s are prohibited to enter into any such contract or agreement, because the indictment was for a *conspiracy*, which is an offence at common law; it is true the indictment set forth that they refused to work under such wages as they demanded; but though this might be more than directed by the statute, yet it is not for the denial, &c. but for the conspiracy that they were indicted, which in itself is illegal whether the matter be lawful or not. And judgment confirmed per tot. Cur. 8 Mod. 10. Mich. 7 Geo. 1. The King v. the Journey-men Taylors of Cambridge.

But if a fault in the indictment is plain and apparent, it is quashed for that reason, and the party shall not be put to the trouble to plead or demur. *Ibid.*

10. Indictments for conspiracy are never quashed. Per Cur. Mod. 321. Mich. 11 Geo. 1. The King v. Edwards.

11. A conspiracy to let lands of 10 l. per ann. value to a poor man, in order to get him a settlement, or to make a certificate man a parish officer, or a conspiracy to send a woman big of a bastard child into another parish to be delivered there, and so to charge that parish with the child; certainly these are crimes indictable. 8 Mod. 321. Mich. 11 Geo. The King v. Edwards & al'.

12. The defendants were indicted, for that they per *conspirationem inter eos habitam*, gave the husband money to marry a poor helpless woman, who was an inhabitant in the parish of B. and incapable of marriage, on purpose to gain a settlement for her in the parish of A. where the man was settled; and now it was moved to quash this indictment, because it is no crime to marry a woman and give her a portion, and the justices are not proper judges what woman is capable of a husband; judgment was given for the defendant, because it was not averred in the indictment, that the woman was last legally settled in the parish of B. but only that she was an inhabitant there. 8 Mod. 320. Mich. 11 Geo. The King v. Edwards & al'.

13. Sessions have jurisdiction of conspiracies; per Cur. 8 Mod. 321. Mich. 11 Geo. in case of the King v. Edwards.

(I) Judgment. Error:

S. P. Br. Verdict, pl. 88. cites 24 E. 3. 73. 1. IN conspiracy against several, one appeared and pleaded not guilty, and was found guilty with another who did not appear, and the plaintiff recovered by judgment, and he brought error because he was condemned and none of the others, and one only cannot conspire, and yet the judgment was affirmed; for it is found that he and another conspired,

conspired, therefore it shall bind the defendant, but it shall not bind the other who did not appear and plead, but it is sufficient against the defendant; quod nota. Br. Conspiracy, pl. 21. cites 24 E. 3. 34.

2. *Two men were attainted of conspiracy by verdict, by which it was awarded that they lose their free law, to the intent that they should not afterwards be put in juries, nor in assise, nor otherwise in testimony of the truth, and if they have to do in the king's court, that they should make their attorney, and that their lands, goods, and chattles should be seised into the hands of the king, and wasted if they could not have better grace, and their trees grubbed up, and their bodies to prison.* Br. Conspiracy, pl. 28. cites 27 Aff. 59.

3. An abbot, and A. his monk, bring a writ of conspiracy against B. C. and D. and the writ says, that B. *falsely and maliciously conspiravit cum C. and D.* & *conspiracione præ-antea habita procured the said A. to be appealed of a robbery, for which the said A. was taken and committed to Newgate, and indicted, and thereof acquitted.* B. pleads not guilty, and is found guilty, and judgment is given that the abbot shall recover damages, although none of the other defendants were afterwards attainted of this conspiracy, nor any process, after judgment had against C. or D. judgment was affirmed in B. R. The reason is, the procurement was only laid in B. and after issue and judgment B. was seivered from the others, viz. C. and D. and the suit was determined as to B. The abbot had judgment only to recover his damages and costs, and the defendant in this case had not the villainous judgment: that is never to be a witness, never to approach the king's palace, to be imprisoned for life, his houses to be pulled down, his wife and children being first cast out of them, his trees cut down, his meadows plowed up, and his lands, goods, chattels, and writings seised into the king's hands. Jenk. 31. pl. 62. cites 27 Aff. 43 E. 3. 4 H. 5. Stam. 115.

S. P. Br. Conspiracy, pl. 31. cites 46 Aff. 11.

* [427] One may be indicted of a conspiracy at the suit of the king, and then he shall have a villainous judgment. 24 E. 3. 34. 73. 43 E. 3. 33. But at the suit of the party, it shall be only a capiatum. 27 Aff. 59. Judgment on indictment of conspiracy as in attain. cites 4 H. 5. Judgment, 220. F. N. B. 114. (D) in the new

notes there (a).

† 2 Inst. 384. S. P. — 3 Inst. 143. cap. 66. S. P. — Ibid. 222. cap. 101. S. P. But by Shard, such villainous judgment is only given where the suit is by the king, but at the suit of the party it is not so, but is only that he shall recover damages. Mich. 24 E. 3. 34. b. pl. 34. the Abbot of Hide v. Moscheiden & al'. — Hawk. Pl. C. 193. cap. 72. S. P. says, that a villainous judgment is given by the common law, and not by any statute, and is said generally, in some books, to be the proper judgment upon every conviction of conspiracy at the suit of the king, without any restriction, to such as endangered the life of the party; but he does not find this point any where settled.

4. In conspiracy upon an indictment of trespass the defendant said that they were impannelled before justices of the peace in N. and that which they did was upon their oath; judgment si actio, and the plaintiff replied that no such record, and writ awarded to the justices of peace to certify it, and at the day the parties appeared, and the justices did not return the writ, and they had day over, and then the defendant made default, and the plaintiff had writ of inquiry of damages which returned 40l. and there it was agreed, that conspiracy lies well upon indictment of trespass as of felony; and because the damages were too high, the plaintiff released

S. P. Br. Conspiracy, pl. 25. cites 3 Aff. 13.

leased 20 l. and had judgment of the rest; for the court said, if he would not release part, they would abridge. Br. Conspiracy, pl. 11. cites 7 H. 4. 31.

For more of Conspiracy in general, see *Actions on the Case*, (P. c) (Q. c) (R. c), *Indictment* (E), *Information*, and other proper titles.

* Decennarius *prima facie* is the same with a constable, and differed little in the execution of that office, concerning keeping the peace, yet Hale said, he was not the same officer.

* Constable.

(A) His Antiquity. And how considered.

1. **T**HE *constable* is the keeper of the peace, that is to say, the *high-constable* for the hundred, and the *petty-constable* in the town. Kitch. of Courts, 97. cites 12 H. 7. fol. 38.
Vent. 170.
per Cur. Mich. 23 Car. 2. B. R. in case of Waldron v. Ruscarril.—In some places they have tithingmen † and no constables. Per Hale Ch. J. and Lambard, 14. being cited, that the constable and tithingman are all one, Hale said that so it is in some places; that *præpositus* is the proper word for a constable, and decennarius for a tithingman. Mod. 78. pl. 38. Mich. 22 Car. 2. B. R. in S. C.—*High-constable* was an officer at common law before the statute of Winton as well as a *petit-constable*, and they are officers to the justices of peace; per Cur. 1 Salk. 175. in the case of the Queen v. Wyatt.—2 Ld. Raym. 1192, 1193. Trin. 4 Ann. in case of the Queen v. Wyatt, Powell J. says, that my Ld. Coke, 4 Inst. 267. says, that a constable of a hundred was not an officer at common law, but created by the statute of Winchester; but Powell J. held, that he was an officer at common law, and the statute of Winchester only enlarged his authority in some particulars; and so it was held by my Ld. Ch. J. Hale, in the case of THE KING v. KING, and the case of THE KING v. SAMOIS, Hill. 16 & 17 Jac. cited for it; and the new authority which was given them by the statute of Winchester was what occasioned the mistake; and so they are officers of the peace, and officers to the justices of peace, where no particular officer is named.
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2. At common law, before the making of the statutes, by which justices of the peace were ordained to keep the peace, the Ch. J. of England was appointed by the king, and he had authority, and was ordained to determine matters touching the crown, and for conservation of the peace throughout the realm, and he thereby is the Ch. J. of peace. Also by the common law, before there was any justice of the peace, *constables of every town* were keepers of the peace within their towns. Kitch. of Courts, 96.

3. An *high-constable* is not such an officer or conservator of the peace whereof the common law takes any notice; for he is not mentioned in any book; per Anderson. Cro. E. 375. pl. 25. Hill. 37 Eliz. in case of Sharrock v. Hannamer.
S. C. cited by Holt Ch. J. 2 Ld. Raym. Rep. 1195. and says, that this point has been contradicted in my Ld. Hale's time, Mich. 25 Car. 2. and says, that it has been held, that a high-constable was an officer at common law, and had power to do all things which a petty-constable can do.—3 Keb. 231. in pl. 47. Mich. 25 Car. S. P. by Hale Ch. J.—2 Hawk. Pl. C. 33. cap. 8. s. 6. S. P.

4. *High-constables* were not ab origine, but came in with justices of the peace; per Twilden J. Mod. 13. pl. 26. Mich. 21 Car. 2. B. R. 3 Keb. 231 pl. 47. Mich. 25 Car. 2. B. R. in the

case of THE KING v. KING, Hale Ch. J. said, that contrary to 4 Inst. it hath been held, that a high-constable was an officer at common law.

5. As to the antiquity of the office of a constable, it seems to be the better opinion, that both constables of hundreds, which are commonly called *high-constables*, and also constables of tithings, which are at this day commonly called *petit-constables*, or *tithing-men*, and were anciently called chief pledges, were by the common law, and not first ordained by the statute of Winchester, cap. 6. as it is holden by some that they were; for that statute does not say there shall be such officers constituted, but clearly seems to suppose that there were such before the making of it. 2 Hawk. Pl. C. 61. cap. 10. f. 33.

(B) By whom made, and removed.

1. NOTE, that a *sheriff*, *constable*, and *headborough*, were conservators of the peace at common law, and yet are conservators of the peace: Br. Peace, pl. 13. cites 12 H. 7. 17. per Fineux Ch. J.

2. A writ of *restitution* does not lie to restore a constable, but an order by the rule of court was made for the restoring, placing, and settling him in his place again, he being chose by the vill, and approved by the lord, and sworn; in which case the justices of peace had no power; per Williams J. to which the whole court agreed. Bullst. 174. Trin. 9 Jac: the Constable of Stepney's case.

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But the lord who approved of the choice of him may again, for just cause, remove him; per tot. Cur.

agreed. Ibid. — 2 Hawk. Pl. C. 63. cap. 10. f. 38. says, it seems clear, that the sheriff or steward having power to place a constable in his office, have by consequence a power to remove him.

3. Constable elected at the leet was discharged at the *sessions*, because he was a *master of arts*, &c. He was not sworn, but they elect and swear another. The King's Bench may, upon complaint, grant a writ to discharge the last, and swear the other; for the election of a constable belongs properly to the leet, unless a reasonable cause be to the contrary. See Courts (I. a), pl. 1. and the notes there. And (U. a), pl. 5. 10 Car. B. R. Heron's case.

4. 13 & 14 Car. 2. cap. 12. f. 15. *If constables, headboroughs, or tithingmen die, or go out of a parish, two justices of peace may swear new ones, till the lord of the manor hold a court-leet, or till the next quarter sessions, who shall approve of them, or appoint others; and if any officers continue above a year, the justices of peace, at their quarter-sessions, may discharge them, and put in others, till the lord of the manor hold a court.*

5. Johnson prayed *certiorari* to remove an order of sessions to remove a gentleman chosen constable in the leet by spleen, which the court granted; but whether the justices may or not, they will here remove such person being unfitting, as in Alderman ABDE's CASE. And if the new one be not duly chosen, the old one must serve. Keb. 439. pl. 27. Hill. 14 & 15 Car. 2. B. R. The King v. Wright.

6. The book of *Villarum* in the Exchequer sets out all the *vills*, and there cannot be a constablewick created at this day; per Moreton. Mod. 13. pl. 36. Mich. 21 Car. 2. B. R. Anon.

7. On a motion to quash an order of the justices for one to serve as constable of H. Moreton J. said, if a leet neglects to choose a constable, upon complaint to the justices of peace, they shall by the statute appoint a constable. And Twisden J. said, that in this case there are affidavits that there never was any constable there; and he cannot tell whether or no the justices of peace can erect a constablewick where never any was before; if he will not be sworn, let them indict him for not executing the office, and let him traverse that there never was any such office there. Keeling bid him go and be sworn, or if the justices of peace commit you, bring your action of false imprisonment. Mod. 13. pl. 36. Mich. 21 Car. 2. B. R. Anon.

8. If there be a court-leet that has the choice of a petty constable, the justices of peace cannot choose there; and if it be in the hundred, Twisden J. said, he doubted whether the justices of peace can make more constables than were before. Mod. 13. in pl. 36. Mich. 21 Car. 2. B. R. Anon.

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And an information was brought against King for refusing the office of constable of Norton-ferris, within which was an ancient borough that had a leet, viz. Win-caunton, and he pleaded, that he being within, and residing in the leet of the borough, ought not to do the office of constable of the

9. Information against K. for refusing to take the oath of a constable of the hundred being chosen in the leet. The defendant pleads that *W. is an ancient borough, and that they have a leet there, and used to choose their own officers, &c. within the borough.* The question was, whether the living within the jurisdiction of an inferior leet should exempt a man from being chose high constable in the leet of the hundred? Hale Ch. J. said, the case will be very different if this be really a borough, and if it be an upland town; for formerly in England every hundred used to send their jury, and every borough used to send 4 men of their own, and constables were before the statute, but that gives them view of * armour; and he said that the superior leet shall not meddle in the inferior of matters inquirable there, unless it be in case of omission; but he said, a constable of an hundred was an article that the inferior court could not meddle in, because it is an office that extends beyond their jurisdiction; and so judgment was against the defendant nisi. Freem. Rep. 348, 349. pl. 433. Mich. 1675. Keene's case.

hundred, but judgment was given against him; and it was said that if there were a special custom to be discharged, it might be good. 3 Keb. 197. 230, 231. Trin. & Mich. 25 Car. 2. B. R. The King v. King.

A special verdict found, that within the manor of the hundred of Farnham there are several other manors belonging to divers lords, the inhabitants whereof used to be elected for the said hundred; they find also, that there is the manor of the town of Farnham within the manor of the said hundred, in which there is a court-leet, and that the defendant is an inhabitant within the said town of Farnham, *et non alibi*; and that no inhabitant of the town of Farnham ever served as high constable for the hundred of Farnham. The question arising upon the special verdict was, whether the defendant, being in a particular

a particular leet, is excused from serving as high-constable of the hundred? And on debate the court held, that he is not excused. 11 Mod. 215: pl. 3. Pasch. 8 Ann. B. R. The Queen v. Jennings. — 1 Salk. 383. pl. 33. The Queen v. Jennings, is a different case.

10. *S. was presented constable by the homage of a leet in Essex, the steward refused to swear him, and nominated and swore in his place one R.* The justices of peace at the quarter sessions, upon an examination into this matter, ordered that *S. should serve the office, and swear him accordingly*; this order was removed by a certiorari, and exception was taken to it, that the justices had inter-meddled in a matter of which they had no cognisance; for the appointment and swearing of a constable did properly belong to the lord of the leet. Per Cur. the election of a constable properly belongs to the homage, and though the justices of the peace have not originally the making of a constable, yet *this is a matter of the peace within their general jurisdiction*, and they have power to examine this matter at the sessions, and as to the swearing of a constable, any single justice of the peace may do it; and the order was confirmed. 2 Jones, 212. Trin. 34 Car. 2. B. R. The King v. Stephens.

Though before the 13 & 14 Car. 2. the justices of peace could not make constables, yet they could swear them. Per Holt Ch. J. 12 Mod. 88. Hill. 7 W. 3. in case of Fletcher v. Ingram.

11. Sessions may chuse a constable, and the order here appointing him to take the oaths is an *election* of him, &c. Per tot. Cur. he may be a person not living within any leet. And per Holtway J. they might have compelled him to take the oaths by increasing his fine. Cumb. 20. Trin. 2 Jac. B. R. Anon.

If there is no leet at all then you must go to the sheriff's town. How can justices

of peace make a constable who is an officer at common law, and they only by statute? only there may have been such an usage from the neglect of those to whom it properly belonged; perhaps there may have been some old statute for it, which is lost. Per Holt. 12 Mod. 180. Hill. 9 W. 3. The King v. Hewson.

12. The steward of the leet usually certifies under his hand what person is chose, which *certificate* is carried to a justice of peace, and if the party refuse, the *justice sends his warrant* to compel him, but steward may, during the court, swear the constable as well as a justice of peace after. 5 Mod. 128. Mich. 7 W. 3. in case of Fletcher v. Ingram.

But after adjournment the steward has no authority. 12 Mod. 88. S. C. — Ld. Raym. Rep. 70. Per Holt Ch. J.

S. C. & S. P. — Comb. 351. S. C. & S. P. per Holt Ch. J.

13. At common law all constables were chosen at the leet, and where there is *no leet*, at the *tourn*, but * whether by the steward or the homage has been a great question; but without question a *corporation* of common right cannot *chuse* a constable; by *custom* they may, but then they must *prescribe* for it. Per Holt. 2 Salk. 502. pl. 2. Mich. 8 W. 3. B. R. The King v. Barnard.

12 Mod. 115. S. C. accordingly. — Skinn. 669. pl. 6. S. C. the Court seemed accordingly, sed adjournatur.

— Ld. Raym. Rep. 70. S. C. & S. P. per Cur. — Where there is no leet, † he must be chose at the tourn, yet his power would be restrained to the particular hundred. Per Holt Ch. J. 11 Mod. 215. Pasch. 8 Ann. B. R. in case of the Queen v. Jennings.

• S. P. by Holt Ch. J. 12 Mod. 88. Hill. 7 W. 3. in case of Fletcher v. Ingram.

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14. The village of C. having no constable, the justices by order of sessions appointed one to serve there; and per Holt Ch. J. the justices

12 Mod. 180, 181. Hill. 9 W. 3.

The King v. Hewson, S. C. Holt Ch. J. said his opinion was, that the justices of peace could not create a constable where none was before, though he had heard it said in Ld. Ch. J. Keiling's time, that if a town be newly built, and they want a constable, that the justices of peace may, and it being in this case contested whether there was a constable before, it was ordered to be tried.

S. P. of the constable of the hundred, or high-constable, that are chosen by them, if there be good cause of removal. Bu't. 174. Trin. 9 Jac. in the Constable of Steepney's case. — But if it be in a manor, and the constable is chosen and sworn in the court-leet, the justices of peace have no power or authority to discharge him. Ibid.

15. High constables are removeable as well as petty constables, and the *justices* of peace at sessions are the best judges of that matter; per Cur. 1 Salk. 150. pl. 19. Pasch. 4 Ann. B. R. in case of the Queen v. White.

16. The mayor of A. set up a custom that the court-leet there ought to make a list every year of 5 persons to be presented to the mayor, and that he ought to chuse one out of them for constable, and that the jury should chuse the other out of the remaining 4; now this year the jury had made no list, but the parishioners chose the constables themselves. Upon the mayor's applying to the sessions, they made an order of discharge of one of the constables, and that the mayor's constable, whom he nominated in default of the jury's giving him a list, should be confirmed. The court now quashed this order; for they said the only statute that gives the justices power at all in relation to constables, is the statute of 13 & 14 Car. 2. cap. 12. [f.] 15. and that act only gives justices power to put in constables in default of the court-leet; but does not impower them to discharge constables already put in. Accordingly the order was quashed. Barnard. Rep. in B. R. 51. Pasch. 1 Geo. 2. The King v. Burden and Wakeford.

(C) Punished for refusing the Office; and who may be chosen Constable.

1. A Master of arts may be elected constable, and this is no cause to discharge him See Court (I. a), pl. 1. Herfon's case.

This is to be granted by reason of their attendance in the public courts. Mod. 22. in pl. 59. — 2 Hawk. Pl. C. 63. cap. 10. s. 39. S. P. and says, that they shall have this privilege even when they are chosen by a particular custom, in respect of their estates or otherwise; for that no such custom shall be intended more ancient than the usages of those courts, and therefore shall give way to them; and that upon the like reasons he finds it taken for granted that *praesiding barristers at law* have the same privilege, but he knows not of any resolution to this purpose.

2. An attorney shall have a writ of privilege for all offices that require his personal attendance, as constable, &c. Agreed per tot. Cur. Mar. 30. pl. 65. Trin. 15 Car. Anon.

3. If

3. If a man be chosen a headborough at a leet, he may be *indicted for not taking his oath*, but then he ought to be *warned to go before a justice of peace* to take his oath, &c. And upon a motion a writ was granted, directed to one Prig, who was chosen an headborough, commanding him to go before some justice to take his oath, &c. Allen, 78, 79. Trin. 24 Car. B. R. Prig's case.

N. B. The indictment was quashed, because it did not appear how he was chosen. Ibid.

4. *Custom* that every watchman of the Custom-house should be free from serving was disallowed; because there being several watchmen in that parish there might be a failure of persons to perform the office, and so a judgment was affirmed. Sid. 272. pl. 28. Trin. 17 Car. 2. B. R. The King v. Clark,

Keb. 933. pl. 43. S. C. He did not shew that watchman was an ancient officer,

nor aver that there are sufficient besides to serve, and therefore judgment for the king. — 2 Hawk. Pl. C. 63. cap. 10. s. 41. says, it seems that even a custom cannot exempt sitting persons from serving the office of a constable, where there are not sufficient besides them to execute it; but says, that this point seems not to be settled, as appears by the various opinions in the books concerning this matter, which are very differently reported.

5. A *custom* in a vill is good, where there are several houses, that every one shall be constable in turn; for though it shall happen to the turn of a widow, she may hire one to serve, and then he who so serves is sworn, and he is the constable and not a deputy; agreed. 1 Syd. 355. Hill. 19 & 20 Car. 2. in Vane's case.

6. A *practising physician* in London was chosen constable in a parish, and on a motion for a writ of privilege it was denied, and a difference made between an *attorney or barrister at law* and a physician; that the privilege of the former is, because of their attendance in public courts and not on account of any private business in their chambers; but a physician is a private calling, and therefore they would not introduce new precedents. Mod. 22. pl. 59. Mich. 21 Car. 2. B. R. Dr. Pordage's case.

2 Keb. 578. pl. 104. S. C. the court ordered to shew cause why he should not be exempted, but inclined that it lay not.

— Sid. 431. pl. 19. the King v. Pordich, S. C. it was ruled, that he should be discharged of the office, nisi, &c. — 2 Hawk. Pl. C. 63. cap. 10. s. 41. says he has no remedy for his discharge; for there are no precedents of this kind, and his calling is private; but says he thinks, that if there are sufficient persons besides in the place to execute the office, and no special custom concerning it, he may perhaps be relieved in B. R.

7. The privilege of exemption from being sworn constable extends to a *parliament man's servant*; agreed and admitted by Twissden J. but he said he did not think it extended to his tenant. Mod. 13. pl. 36. Mich. 21 Car. 2. B. R. Anon.

8. A. was actually *constable of the hundred of B.* and lived at W. within the hundred of B. in *Essex*, and being *chosen collector for the poor in Cornhill in London* where he first lived, a writ of privilege was moved for and granted. 3 Keb. 627. pl. 16. Pasch. 28 Car. 2. B. R. The King v. Rice.

2 Jo. 46. Price's case, S. C. and he was discharged till his office of constable should expire.

9. A *tenant in ancient demesne* is liable to the office of constable; held per Cur. Vent. 344. Mich. 31 Car. 2. B. R. Anon.

2 Show. 75. pl. 59. Trin. 31

Car. 2. B. R. the King v. Bettelworth, seems to be S. C. and judgment pro rege.

10. Replevin; the defendant justified as bailiff, &c. in a court-leet, by a *custom* there to *chuse a constable and impose a penalty of 40 s.* upon

Comb. 350. S. C. adjudged. —

upon him if he refused. The jury elected the plaintiff under the penalty, *et inde notitiam habuit*, but did not execute the office, which being presented at the next court, &c. the defendant distrained. Per Holt, fines and amerciaments being by common right may be levied by distress, but this is a *customary penalty contrary to common right*; for it is taxed * before refusal, and so not to be distrained for, without alleging a custom for so doing, and the notitiam habuit is too general; for it ought to have been shewn that he was summoned within a convenient time to take the oath before a justice of peace as usually done; and, per Rookby, the defendant has failed in not alleging a custom for the distress; *judicium pro quer.* 12 Mod. 87. Hill. 7 W. 3. Fletcher v. Ingram.

Suppose of common right the steward ought to elect the constable, and by custom the homage do, if the person thus elected by the homage by custom, where of common right his election belonged to the steward, refuses in court, yet the steward may impose a fine upon him if present; per Holt Ch. J. 12 Mod. 88. S. C. Comb. 350. S. C. adjudged. — Skinn. 635. S. C. adjudged. — Ld. Raym. Rep. 69. S. C. adjudged. — 2 Hawk. Pl. C. 64. cap. 10. s. 46. S. P. and says, that it also seems that in either case he may be indicted, either in the sessions of the peace, or before justices of oyer and terminer.

12. The lord or steward of a leet may refuse a constable for good cause, and the justices of peace have done the same; Arg. Ld. Raym. Rep. 138. Hill, 8 & 9 W. 3.

13. An order for making a constable was quashed absente Holt, for that it did not appear by the order that he was an inhabitant of the liberty though of the parish. 12 Mod. 256. Mich. 10 W. 3. Anon.

14. The late constable is not discharged till the new is sworn, because the parish cannot be without an officer. 12 Mod. 156. Mich. 10 W. 3. Anon.

15. No man that keeps a publick house ought to be a constable; per Holt Ch. J. 6 Mod. 42. Mich. 2 Annæ B. R. Anon.

2 Hawk. Pl. C. 64. cap. 10. s. 43. says it seems that by the equity of this statute, and the ancient custom of the realm, all surgeons have been allowed the like privilege. — A surgeon was indicted for refusing to serve the office of constable, whereupon a noli prosequi was moved for, and granted nisi; and the reporter says, that no cause was shewn, as ever he heard. Comyns's Rep. 312. pl. 161. Mich. 3 Geo. 1. B. R. the King v. Pond.

The sessions cannot imprison for re. 17. Where a constable is chosen at a leet and refuses to act, whether he is indictable at sessions, or amerciable only at the leet, several

Constable.

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several cases were cited against the power of the sessions, and time was given to the counsel of the other side to answer the objections. Gibb. 192. Hill. 4 Geo. 2. B. R. The King v. Lone.

fusal, but
he ought to
be ind. & ad;
quod curia
concessit.

12 Mod. 180. Hill. 9 W. 3. The King v. Hewison.

(D) Favoured or punished.

1. **C**. Was indicted for that a *burglary was committed in the night by persons unknown*, and J. S. gave notice to him being constable, and required him to make hue and cry, and he refused, but because he did not *show the place of notice* the party was discharged. Cro. E. 654. pl. 16. Hill. 41 Eliz. B. R. Crowther's case.

2. Another exception was taken to the matter of the indictment, because it has been adjudged, that an hundred shall not be charged with a robbery *committed in the night*, for they be not bound to give attendance; no more ought a constable to do it in the night. But all the court held the indictment to be good notwithstanding; for it is not like to the case of an hundred; because it is the *constable's duty, upon notice given unto him, presently to pursue*. Cro. E. 16, 17. pl. 16. Hill. 41 Eliz. Crouther's case. [434]

3. Several constables were indicted for *refusing to execute the warrant of a justice of peace directed to them to apprehend one for contempt*, and the indictment was allowed. 2 Roll. Rep. 78. Hill. 16 Jac. B. R. Coleman's case.

4. A constable is not *seizable out of the county* for what he does in execution of his office. Held per Cur. Sty. 393. Mich. 1653. B. R. Anon.

5. The defendant being a constable, was *indicted for that he contemptuously and voluntarily neglected to execute diversa precepta et warranta directed to him* by justices of peace under their hands and seals; but it was quashed, because it did *not set forth the nature and tenor of the warrants*, for unless the defendant can know what particularly he is charged with, he cannot tell how to make his defence. Vent. 305. Hill. 28 and 29 Car. 2. B. R. Burrough's case.

6. In an *habeas corpus* and *certiorari* for the body of J. S. who had been imprisoned for not paying of a fine of 20l. set at the quarter sessions, the return was, that he, being constable and demanded by the Court to present an *highway*, which was sworn before him by two witnesses to be *out of repair*, said in contempt of the Court, that he *would not present it*; for which, and certain other contemptuous words, a fine was set on him. The Court were of opinion, that the fine was not well set; for constables are to present upon their own knowledge, and the two witnesses should have been carried to the grand jury; for the constable was not obliged to present upon their testimony. Vent. 336. Pasch. 31 Car. 2. B. R. Anon.

7. Moved to quash an indictment *against diverse inhabitants in Derby, for refusing to meet and make a rate upon the several parishes in Derby* 2 Salk. 609. pl. 1. the King, &c.

v. Barlow.
S. C. where
a statute di-
rects the do-
ing a thing
for the sake
of justice or
the public
good, the
word (may)
is the same
with the
word (shall),
per Cur.——

Derby to pay the constable's tax; first, because they are not com-
pellable, but the statute only says that they may, so they have their
election, and no coercion shall be, sed non allocatur; for *may* in the
case of a publick officer is tantamount to *shall*, and if he does not
do it, he shall be punished upon an information, and though
he may be commanded by a writ, this is but in aggravation of
his contempt; but the court refused to quash it. Skin. 370. pl.
17. Mich. 5 W. and M. in B. R. The King v. the Inhabitants
of Derby.

Carth. 293. S. C. accordingly.

8. If a justice of the peace adjudge that to be an offence which is no
offence, the inferior officer shall answer; as if one be adjudged the
putative father of a bastard, where after it appears to be born in
matrimony, this is void, & coram non judice, &c. Per Holt
Ch. J. Skin. 445. Trin. 6 W. and M. in B. R. in case of Crump
v. Holford.

9. A leet may set a fine on a constable, but the sessions can-
not. 5 Mod. 96. Trin. 7 W. 3. in a nota at the end of the case
of the King v. Harpur.

10. False imprisonment against a constable for executing a warrant
of Sir James Butler, after he was out of the commission of the peace.
Per Holt, constable at his peril is to take notice that his warrant is
by one in commission; but all the favour we can do is, since it was
a warrant executed a day or two after Sir James was out of com-
mission, that if he has behaved himself honestly and civilly, to be
mild to him; and he said, the constable ought to shew the justice
of peace's commission, though heretofore it were held common
reputation would be enough; and here the constable coming out of
his own parish to execute the warrant, betrays his officiousness. 12
Mod. 347. Mich. 11 W. 3. Normand v. Mills.

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11 Mod. 53.
pl. 30.
Pasch. 4
Ann. B. R.
the S. C.
exception
was taken
that there
ought to
have been a
time and
place, when
and where
the constable
should have
returned his
warrant to
the justices;
for he is not
bound to
travel over
England to
find them.
But judg-
ment was

11. A constable was indicted, for that one Nash was convicted
of deer stealing, upon the statute 3 and 4 Will. 3. cap. 10. and that
the defendant being a constable, the justice directed his warrant to
him to levy the penalty, which he did, but had not returned the war-
rant, or made any certificate thereof, he was found guilty; and it be-
ing removed by certiorari, it was resolved that though the constable
is not named in the statute, yet the justices may command him
to execute the warrant, because, as at common law a constable
was subordinate officer to the conservators of the peace, so he is
now a proper officer to the justices; and that where an officer neg-
lects a duty incumbent upon him, either by the common law, or
statute, he is indictable, and further that the constable need not
return the warrant itself; because it may be necessary for him to
keep it in his own defence; but he must either return that or certify
what he has done upon it; for otherwise the prosecutor can-
not attain the end of his prosecution, and the defendant can-
not be discharged. 1 Salk. 380. pl. 28. 2 Ann. B. R. The
Queen v. Wyatt.

given against the defendant, dissentiente Holt Ch. J. not but that he said it was an offence; but he said that

that in all process there ought to be a place and time for the return.—2 *Ld. Raym. Rep.* 1189. *S.C.* adjudged for the queen by 3 justices.—If an officer be negligent in doing of his office, it is an offence at common law, and upon the 4th and 5th *W. and M. cap. 10.* an high constable was indicted for not returning his warrant, and these points were resolved, that a constable was an officer at common law, and per *Powell*, so was an high constable, contra to the opinion of *Coke* in his 4th Institutes, and he is a subordinate officer to a justice of peace, and whenever a justice of peace is commanded to do any thing, he is the person who is to put this in execution, for the justice cannot command the sheriff, or the party, unless there be express words of an act of parliament for it, and matters being left so indifferent, if the constable doth not do his duty, he is punishable at common law. 2 That the indictment reciting the record of conviction, need not to conclude *patet per recordum*, for this is but matter of inducement, and where nul tiel record cannot be pleaded, there needs not proof per recordum. 3dly, Here is a great offence, for the warrant says, that the officer ought to return the warrant, because by the act the justice is to do some other thing afterwards, in case there be not goods out of which the penalty can be levied; and though no place is mentioned where the warrant is to be returned, it is well enough, for the officer is to find out the justice, and to give him an account what he has done upon his warrant, as the justice may require him to do; and upon not guilty pleaded, the officer may prove that he went to seek the justice but could not find him, and this will be a good excuse. Per three justices, as to this last point, against the Ch. Justice, who thought that both a place where, and the time when the return should be, ought to be mentioned. 4thly, If the offender have but 50*l.* worth of goods, and the sum to be levied is 100*l.* the officer cannot levy the 50*l.* only. The act doth not require that the justices must distribute the money themselves, but the officer may well do it as the act directs. If there be three several convictions, and the offender hath no more goods than will answer two of those convictions, he may pay the two, and stand in the pillory for the other; the money cannot be levied by parcels. So it is in case there be but two convictions, and the offender hath only goods to answer one of them, he may be pilloried for the other. 5thly, That though the indictment were, that he did never return the warrant, nor cause it to be returned, yet this was well enough, for the neglect was the offence. 6thly, That the justice must make a warrant to levy the penalty, and that the justice cannot do this himself. *The Queen v. Wyatt.*

12. Constable is the proper officer to the justice of peace, and indictable for neglecting duty required by common law or statute. 1 *Salk.* 330. pl. 28. 2 *Ann. B. R.* *The Queen v. Wyatt.*

13. An indictment against P. for not executing a warrant of a justice of peace upon a common baker, for exercising his trade on a Sunday, contrary to the act. Exception was to the indictment, that it does not appear the conviction was within 10 days after the fact, which is the time limited by the act; the indictment said only *debito modo convictus*. *Holt Ch. J.* was of opinion, that since it was said that he was convicted, it shall be taken for a good conviction in all respects, and the defendant should have taken advantage of the contrary, by shewing it in evidence upon the trial. 11 *Mod.* 114. *Pasch.* 6 *Ann. B. R.* *The Queen v. Pawlett.*

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14. In false imprisonment, the case was that the *Ld. Ch. J. of B. R.* having in the late reign signed a warrant for apprehending the plaintiff; the defendant being a constable arrested him upon the same after the late king's demise, and thereupon the justices of sessions granted a warrant for his commitment; et per *Eyre Ch. J.* the warrant of the *Ld. Ch. J.* became ineffectual and void by his late majesty's demise, so that the imprisonment having been upon a void process the action lies. *Gibb.* 80. *Trin.* 2 and 3 *Gco.* 2. at nisi prius in *Middlesex.* *Anon.*

See tit.
Trespass
(E. 2), pl.
16. Beale v.
Carter, and
the notes
there.

(E) His Power and Authority as Constable without a Warrant.

Br. Peace,
pl. 2. cites
S. C. and
says, note,
that the con-
stable has
power to take
a man and
make him
find surety of
peace, but upon no pain, and if he will not, he has power to imprison him till he has found surety,
quod nota, and this surety seems to be by obligation, for he can not take recognizance.

1. IF any be threatened upon complaint to the constable, he may enforce the party to put in a surety, and if he do not he may commit him to prison till he has found a surety. Kitch. of Courts, 96. cites 4 E. 3. Bar. 102.

2. Trespass of assault and imprisonment, the defendant said that he was constable, and the plaintiff would have broke the peace, and the defendant took, arrested, and imprisoned him till he found surety of the peace, and the opinion of all the justices was that the constable may take surety of the peace, but upon no pain. Quere in what manner such surety shall be, it seems to be by obligation, which cannot be but in some sum certain. Br. Surety, pl. 23. cites 3 H. 4. 9.

3. Constable may arrest one to find surety of the peace, and if he will not obey he may take power to enforce him, and one may justify that comes in aid of the constable, to arrest one that makes an assault. Kitch. of Courts, 96. cites 3 H. 4. fol. 10.

4. Constable may search for suspicious persons, and may arrest night-walkers. Kitch. of Courts, 98. cites 2 E. 4. fol. 9.

Br. Faux
Imprison-
ment, pl. 24.
cites 10 E. 4.
17. S. P.

5. In trespass it was touched that constable was ordained to keep the peace and apprehend felons, and that constable may take surety of the peace by obligation, if he finds one making an affray. Br. Surety, pl. 26. cites 10 E. 4. 18.

6. Constable may arrest one which makes a fray, and carry him to the next gaol till he finds surety for the peace; but not imprison him in his house, or put him in the stocks, unless it be in the night, that he cannot carry him to the gaol [or] for any other reasonable cause. Kitch. of Courts, 98. cites 22 E. 4. fol. 35. Per Bryan.

Kitch. of
Courts, 96.
cites S. C.
— Arg.
2 Bulst. 329.
cites S. C.
— S. C.

7. If a man makes assault upon the constable, he may justify to arrest him who made the assault, and to carry him to gaol for breaking the peace, though he himself be party, viz. the constable upon whom the assault was made; quod nota. Br. Faux Imprisonment, pl. 41. cites 5 H. 7. 6.

& S. P. cited by Coke Ch. J. Roll. Rep. 238. Mich. 13 Jac. B. R.

[437] 8. Constable may search for suspicious bawdy-houses where women of ill fame are, and may arrest suspected persons which walk in the night, and sleep in the day, or keep suspicious company, and if he be not of power to arrest them, he may have aid of his neighbours by the law, 3 H. 7. fo. 10. that he may have aid. Kitch. of Courts, 98. cites 13 H. 7. fol. 10. title Recognizance, 14 Brooke.

9. A constable or sheriff may *let to bail by bond* one arrested for such felony for which he is bailable, but not by recognizance. Dal. 11. pl. 9. Pasch. 7 E. 6. Anon.

The constables or petty-constables may take surety

of the peace by obligation. 4 Inst. 265. in cap. 54. ad finem. — Gilb. Hist. View of the Exchequer, 102. cites Dal. 11. and says that no recognizances were taken to the king by the ancient conservators of the peace, nor by the sheriffs nor constables, but in cases where the defendants were bailable, the sheriff or constable took an obligation in his own name, but not any recognizance to the king; but the sheriff himself bailed to appear at his own torn, and the constable to appear at the view of frank-pledge. But those obligations taken by the constables are not now in use, and the justices now take bail by recognizance to the king.

10. *If any be struck, and in peril of death, the constable ought to arrest the offender, and to keep him in prison till it be known if he will live or die, or till he have found sureties* to appear before the justices at the gaol delivery. Kitch. of Courts, 96.

11. 38 H. 8. tit. False Imprisonment, 6. it is said that one can not arrest for a fray after it is done, without a warrant; but before it be done, or whilst it is doing, he may. Kitch. of Courts, 98.

12. 3 H. 7. fol. 1. it is held there, that the constable may take the power of the county where there is a fray, and specially to take felons. Kitch. of Courts, 98.

13. A constable, going about his service, is met, and assaulted and abused with diverse opprobrious words, and his service impeded; the constable seizes the man and carries him to the counter in Wood-street, to be punished for his assault and ill gesture. It was held that he could not justify this; for the constable cannot carry one to prison, but must first carry him before a justice of peace; for a constable cannot commit any one but to the stocks, and that only for a breach of the peace committed in his presence. Savil. 97, 98. Trin. 31 Eliz. Fulwood v. Gascoigne.

14. He may imprison a man in the stocks that refuseth to watch, being an inhabitant, and no stranger; per Wray, but Gawdy e contra. Cro. E. 204. pl. 37. Mich. 32 & 33 Eliz. B. R. in case of Stretton v. Brown.

15. B. brought a child of 2 months old, and laid it in the parish church-yard of A. to the intent to have destroyed it, or to charge the parish with the keeping of it; and the constable arrested him, and put him in the stocks, and this was held a good justification, for it is an ill practice, and is good cause to stay the plaintiff, and imprison him, and judgment accordingly. Cro. E. 287. pl. 1. Mich. 34 & 35 Eliz. B. R. Beal v. Charter.

Le. 327. pl. 462. Trin. 31 Eliz. S. C. says that all the justices were of opinion against the plea, but would not

give judgment by reason of the ill example, but left the parties to compound the matter. Gawdy J. said it was a great offence in the plaintiff, but the same ought to be punished according to law; but that the constable cannot imprison but only to stay him, and bring him before a justice to be examined. And by Wray, if the defendant had pleaded that he stayed the plaintiff upon that matter to have brought him before a justice of peace, it had been a good plea; and Fenner said that the justification had been good, if the defendant had pleaded that the plaintiff refused to carry away the child. — Ow. 98. Hill. 31 Eliz. S. C. reported according to Le. 327. — Mo. 284. pl. 436. Keale v. Carter. Hill. 32 Eliz. S. C. the defendant imprisoned the plaintiff till he agreed to re-take the child, and the justification adjudged good. — Poph. 72. Hill. 35 Eliz. Anon. but S. C. Fenner held that what the constable did was lawful, and Popham Ch. J. of the same opinion, and it was agreed that the plaintiff take nothing by his writ.

Ow. 105.
35 Eliz.
Scarret v.
Tanner,
S. C. adjor-
natur.

16. A constable *after an affray is over* cannot take *sureties* of the peace, because J. S. stood in fear of his life, and for want thereof to * commit; adjudged. Cro. E. 375. pl. 25. Hill. 37 Eliz. B. R. Sharrock v. Hannemer.

Ow. 105,
106. C. B.
Scarret v.
Tanner.
S. C. An-
derson said
that the con-
stable cannot
take secu-
rity, nor re-
cognizance,
nor bail;
and if he
does take a
bond, he
made a
quære how
he should
certify it,
and into
what court.
But Walms-
ley e contra,
who said

17. But a constable *may commit a man for a breach of the peace in his view*, but not if done out of his sight. He cannot take an obligation for the peace, if broken out of his view; per Anderson. But Walmsley said a petty constable may do it, if out of his sight, upon information that one intends to make a battery and disturb the peace; for by preventing the occasion of the breach of the peace it shall be well preserved. So 44 E. 3. tit. Barre, he may do it if information be given of a breach of the peace, or that he comes where an assembly is to break it. But he may not *take sureties* by recognizance entered, because he is not a judge or officer of record; but *by obligation* he may. But this obligation must be *in his own name, and not in the queen's name, and shall be certified at the sessions of the peace*, and he cannot take an obligation but upon view of the peace broken, or tumult made. But by Owen he may take sureties before as well as after, for otherwise it would be too late. Cro. E. 375, 376. pl. 25. Hill. 37 Eliz. Sharrock v. Hannemer.

that the constable might take security by bond, though not by recognizance or bail; and Owen said that the taking the surety is good. Sed adjournatur.

S. P. by
Beaumont,
and admitted
by Owen.
Ow. 106.

18. Neither the high or petit constable can *take any man's oath that he is in fear of his life*; per Anderson Ch. J. Cro. E. 375. pl. 25. Hill. 37 Eliz.

19. Common fame is enough to apprehend any man; but if you *arrest a man possessed of money*, and he dies, you are *chargeable* with the money; per Williams J. cites 2 H. 7. and where in the principal case the constable took from the felon the money of which he had robbed the party, and was afterwards robbed of it himself, trover and conversion lies for the party against the constable for the money, but not trespass. Ow. 121. Mich. 3 Jac. Walgrave v. Skinner.

20. A. was possessed of corn at S. and W. the servant of B. by command of B. carried away the corn. A. prayed the constable to detain W. till he could procure a warrant from a justice of peace, which he did; but held, that a constable *cannot detain any person but for felony*. Brownl. 198. Mich. 11 Jac. Ringhall v. Wolsey.

21. An action of *false imprisonment* brought against a constable, who pleaded not guilty, and shewed in evidence, that he *came to search in time of the plague for lodgers in the town, and found a stranger, and questioned him*, which way he came into the town? who answered, over the bridge; and the judge conceived this to be a scornful answer to an officer, and *because he had no pass, but travelled without one, and gave such a scornful answer, the defendant did offer to apprehend him, and the plaintiff thereupon, being present, said to the defendant, he shall not go to prison, but yet offered to pass his word for his forth-coming, upon which the defendant did com-*
mit

mit the plaintiff, and it was ruled upon evidence, that there was good cause to commit the plaintiff *for opposing the constable, though but verbally, in his office*, who is so ancient an officer of the commonwealth. Clayt. 10. pl. 19. before Davenport Ch. B. Mich. 8 Car. Sheffield's case.

22. *A. loses goods, and charges B. with the stealing them.* The constable searches *B.'s house, but finds none* of the goods, yet upon the charge of A. and at his request, the constable may arrest *B.* though he may in discretion refuse, he having found no cause of suspicion on his search. Clayt. 44. pl. 69. August 1636. coram Barkley J. Ward's case.

23. In trespass for taking salmon, the defendant justified by the stat. 1 Eliz. cap. 17. for that he was a constable, and that the salmon were caught at an undue season. Upon a demurrer the plea was adjudged ill, because he did not shew a warrant; for a constable cannot intermeddle without a warrant, nor the leet without a presentment. 1 Salk. 407. pl. 1. Mich. 2 W. & M. in B. R. Atkinson v. Crouch. [439]

24. Constable has no power to require assistance of whom he pleases in searching for nets and other engines to take conies, &c. Comb. 309. Mich. 6 W. & M. in B. R. The King v. Wildbore.

25. Whenever a constable may take up any person, it must be either an actual breach of the peace, or upon good grounds of suspicion, and the cause of his suspicion must be shewn, because it is traversable; and in case of suspicion, where there is a felony done, there is no difference between a public and a private person; agreed. 11 Mod. 248. Mich. 1709. 8 Ann. B. R. in case of the Queen v. Tooley.

(F) His Authority. By Virtue of General Warrants.

1. **I**F a constable by warrant of the peace from a justice of peace arrests the party, and brings him to the justice, who does not put him to find surety, action does not lie against the constable. Br. Faux Imprisonment, pl. 12. cites 21 H. 7. 22.

2. Constable on a general warrant against a person may carry him before what justice he please. 5 Rep. 59. b. Hill. 32 Eliz. B. R. Foster's case.

3. Constables, by virtue of a general warrant, cannot break open a house to take a person unless in case of treason or felony. 1 Bulst. 146. Trin. 9 Jac. Foster v. Hill.

son; per tot. Cur. Brownl. 211. Monrey v. Johnson.

4. Assault and battery by husband and wife against the defendant, a constable, and two others. The defendant justified, that the wife was presented in the leet to be a common scold, and the steward made a warrant to the constable, to punish her according to the

They may enter a house for case of felony or treason

the law, and the defendants went to the plaintiff's house to execute the warrant, and the wife assaulted the constable, wherefore he commanded the other defendants to lay hands upon her, which they did molliter. It was held by the justices to be a good justification, although they neither shew the day when the leet was holden, nor that the plaintiff's house was within the jurisdiction of the leet, nor shewed the warrants of the stewards, for that these were all but inducements to the justification. Mo. 847. pl. 1147. Hill. 13 Jac. B. R. Curtye's case.

3 Bult. 77.
78. S. C. &
S. P. agreed
per tot. Cur.

5. In false imprisonment, the defendant justified as deputy to a constable, to whom a justice of peace had directed his warrant, &c. and also pleaded the 7 Jac. cap. 5. and resolved that he may plead the general issue. Mo. 845. pl. 1141. Mich. 13 Jac. Phelps v. Winchcombe.

6. Justices of peace make a warrant to levy a poor's rate upon J. S. which was directed to the constables of the parish of A. J. S. had lands in A. upon which he had no chattels, but his house stood in the adjoining parish of B. in the same county in which J. S. had goods. The constables of A. levied these goods by virtue of the said warrant, and Holt Ch. J. ruled, upon evidence at the trial, at Hertford summer assizes, 1698, that the goods were well levied. Ex relatione. Ld. Raym. Rep. 735. Hampton v. Lammis.

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7. It was ruled by Holt Ch. J. at Westminster, 14 Feb. 1698, that a constable may execute the warrant of a justice of peace, &c. out of his liberty, but he is not compellable to execute it there. Ld. Raym. Rep. 736. v. Norman & al^s.

8. A constable is an officer but for his own particular vill, and though he may execute warrants in any other part of the county (as any other person may) yet he is not compellable to do it, though the contrary is practised in London by custom; per Holt Ch. J. Cumb. 446. Trin. 9 W. 3. B. R. Anon.

vs Mod.
130. Hill.
9 W. 3. the
King v.

9. If a warrant be directed to a constable by name, he may execute it *out of his precinct; per Holt Ch. J. 1 Salk. 176. Trin. 11 W. 3. B. R. in case of Chorly Vill's case.

Hewson, S. P. and seems to be S. C. — 3 Salk. 98. pl. 1. S. C. * Any where within the jurisdiction of the justice of peace. Arg. 11 Mod. 246. cites King v. Chandler. — 2 Ld. Raym. Rep. 1299. Holt Ch. J. cites it as a point settled, Hill. 11 W. 3. in case of the King v. Chandler. — 2 Hawk. Pl. C. 86. cap. 13. f. 30. S. P.

On a war-
rant directed
to all con-
stables, it is
the same as
if directed to

10. But if a warrant is directed to all constables generally, such warrant cannot be executed by any constable out of the precincts of his own parish, for he is a constable no where else. Carth. 508. Hill. 11 W. 3. B. R. in case of the King v. Chandler.

If directed to each particular constable, and every one is bound to execute it in his own particular jurisdiction; but if one constable returns, that he has no distress in the county at large, it is ill; per Holt Ch. J. Mich. 11 W. 3. 12 Mod. 316. The King v. Chaloner. — 2 Hawk. Pl. C. 86. cap. 13. f. 30. S. P. — 12 Mod. 180. S. P. in case of the King v. Hewson.

11. One might take a warrant to search a suspicious house upon a felony committed, but it is at his peril to execute it in due time, and at suspected houses only, and though a constable may by virtue of such warrant search the house, and do all other things that his war-
rant

rant doth authorize him to do, yet if he goes beyond his warrant, by which any body is damaged, he is answerable for it; per Holt. 12 Mod. 344. Mich. 11 W. 3. at nisi prius.

12. When a constable has a warrant, he is tied up to that warrant to act only as that directs. 11 Mod. 248. Mich. 1709. in case of the Queen v. Tooley.

13. It seems that a constable both may and ought to execute a general warrant to bring a person before the justice of peace, to answer such matters as shall be objected against him on the part of the king; for that the officer ought to presume, that the justice has a jurisdiction of the matter which he takes cognizance of, unless the contrary appear, and it may often endanger the escape of the party to make known the crime he is accused of; but it seems to be very questionable, whether a constable can justify the execution of a general warrant to search for felons or stolen goods, because such warrant seems to be illegal in the very face of it; for that it would be extremely hard to leave it to the discretion of a common officer, to arrest what persons, and to search what houses he thinks fit; and if a justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill it up, surely he cannot grant such a general warrant which might have the effect of an hundred blank warrants. 2 Hawk. Pl. C. 81, 82. cap. 13. s. 10.

14. He cannot justify an arrest by force of a justice's warrant for a matter appearing to be out of his jurisdiction. 2 Hawk. Pl. C. 81. cap. 13. s. 10.

15. He may justify by force of a general warrant expressing no certain time. 2 Hawk. Pl. C. 81. cap. 13. s. 10. [441]

16. It seems, that the arrest of an innocent person may be justified by the warrant of a justice of peace particularly naming him. 2 Hawk. Pl. C. 82. cap. 13. s. 11.

(G) Pleadings.

1. FALSE imprisonment against R. who came vi & armis, and beat and imprisoned him; the defendant said that he was constable, and the plaintiff beat R. almost to death, by which hue and cry was levied, and the defendant would have arrested him, and the plaintiff refused the arrest, by which the constable took power to arrest him, and the damage which he had was because he disturbed the arrest; and to the imprisonment he said, that because the plaintiff beat R. almost to death, he imprisoned him by 4 days, till he perceived that R. would live, and then he let him at large. Judgment, &c. and no more is thereof said, and therefore it seems that it is a good plea. Br. Faux Imprisonment, pl. 6. cites 38 E. 3. 6. and see 38 H. 8. that a man cannot arrest him after the affray is over without warrant; contra before the affray, and in the time of the affray, &c. and so of a justice of peace.

2. In false imprisonment the defendant justified that he was constable of B. and appointed the plaintiff to watch there, and because

3 Le. 208.
Pl. 271.
S.C. & S.P.

held accordingly by Wray Ch. J.

— The constable cannot appoint any to watch at his pleasure, but only in his turn; and in an action against him, he ought to shew not only that he is an inhabitant in the town, but likewise that it was his turn to watch; per Wray. 3 Le. 208, 209. pl. 271. Trin. '30 Eliz. S. C.

cause he refused he put him into the stocks; but upon demurrer, because the defendant did not shew that the plaintiff was an inhabitant there, the court held clearly, that the plea was not good; for he cannot appoint a stranger to watch, neither by the statute of Winchester, 13 E. 1. cap. 4. nor of 5 H. 4. cap. 3. and judgment for the plaintiff. Cro. E. 204. pl. 37. Mich. 31 & 33 Eliz. B. R. Stretton v. Brown.

turn; and in an action against him, he ought to shew not only that he is an inhabitant in the town, but likewise that it was his turn to watch; per Wray. 3 Le. 208, 209. pl. 271. Trin. '30 Eliz. S. C.

3. B. was indicted, for that being constable of the hundred of H. he *arrested one for burglary, and after at D. in the same county, let him escape, and because no place was alleged where the arrest was, and if he should plead not guilty, the venue should be as well from the place where the arrest was made as from the place of the escape, the indictment was held void, and the party was discharged. Cro. E. 200. pl. 25. Mich. 32 & 33 Eliz. B. R. Bouche's case.*

4. P. was indicted, for that he being a constable *arrested J. S. for felony, and voluntarily let him go at large.* Exception was taken to the indictment, because he does *not shew when the felony was committed; for the other may traverse it, and cites 8 E. 4. 3.* And also, he does *not shew when the felony was committed; for it may be it was before the general pardon, and then the permitting him to go at large is no felony; wherefore for these reasons the indictment was held to be insufficient by Clench and Fenner, cæteris absentibus. Cro. E. 752. pl. 10. Pasch. 42 Eliz. B. R. Plowman's case.*

5. Exception to an indictment for *not serving as constable, according to the order of the justices of sessions, was for not alleging any place where he was requested to take the oath, and quashed, especially* [442] *being on order repealed by the justices of assize on appeal. Keb. 418. pl. 133. Mich. 14 Car. 2. B. R. The King v. Chute.*

6. In replevin, the defendant *avows for distress for pain assessed in leet, for not serving there as constable, nor finding sufficient deputy, according to the custom, that he that is chosen must serve per se, or another; and the presentment is, that the plaintiff should find a sufficient person to serve for him, not giving him liberty to serve himself, for which cause Jones for the plaintiff demurred. Judgment for the plaintiff, nisi. Keb. 416. pl. 127. Mich. 14 Car. 2. B. R. Escourt v. Stokes.*

In all actions concerning a fine or amercement for refusing to serve the office of constable, whereto he

is appointed, it is advisable, in all pleadings in any action concerning such fine or amercement, and in all indictments for such refusal, specially and expressly to set forth the manner of every such election, appointment, notice, and refusal, and before whom the court was bolden. 2 Hawk. Pl. C. 64. cap. 10. l. 46.

7. It was moved to quash a presentment, for refusing to be sworn constable of an hundred, because it did *not mention before whom the sessions was held; and Twisden said, that the clerk of the peace ought to be fined for returning such a presentment, and the presentment was quashed accordingly. 1 Mod. 24. pl. 63. Mich. 21 Car. 2. B. R. The King v. Vaws.*

Constable.

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8. H. was indicted, that he being a fit person, &c. was tali die elected to be constable, and afterwards, &c. had notice, but from that day to the time of the indictment non suscepit, &c. sed totaliter neglexit, &c. Pemberton moved to quash the indictment, for that he was not summoned to appear before a justice of the peace to take the oath, &c. and cited BRIG'S CASE, Allen, 78. Per Holt Ch. J. by the new statute 13 & 14 Car. 2. two justices of the peace may make a constable in default of the leet, but then they should issue their warrant, signifying that he was elected constable, and requiring him to take the oaths, &c. quashed nisi. Comb. 328. Trin. 7 W. 3. B. R. The King v. Halford.

5 Mod. 96. the King v. Harpur, seems to be S. C. but not said whether quashed or not.

For more of Constable in general, see Grandamus (K), Robbery (M), and other proper titles.

Contempt.

(A) What shall be said a Contempt.

1. **A** Contempt is a disobedience to the court, or an opposing or despising the authority, justice or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the court. Sometimes it arises by one or more, their opposing or disturbing the execution or service of the process of the court, or using force to the party that serves it. Sometimes by using words importing scorn, reproach, or diminution of the court, its process, orders, officers or ministers, upon executing or serving such process or orders. It is also a contempt to abuse the process of the court, by wilfully doing any wrong in executing it, or making use of it as a handle to do wrong; or to do any thing under colour or pretence of process or authority of this court, without such process or authority. Pr. Reg. in Cane.

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99, 100.

2. T. of F. went armed in the palace, which was shewn to the counsel of the king, by which he was taken and disarmed before Justice Shard, and committed to the prison of the Marshalsea, and could not be bailed till the king had sent his will; and yet it was shewn that the lord of P. menaced and assaulted him the night before, and it was at Paul's, & non allocatur; for he shall have surety against him, and the lord of T. was made to appear, and

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commanded that he should not meddle, who promised it; quod nota. Br. Contempts, pl. 6. cites 24 E. 3. 33.

3. If attorney does not put in his warrant of attorney till judgment or verdict, this is a contempt, and therefore he was imprisoned. Br. Contempts, pl. 21. cites 38 E. 3. 8. & 41 E. 3. 1.

4. In *quare impedit*, if writ is directed to the bishop, who will not receive the presentee, this is a contempt to the king, and the plaintiff shall recover damages against him, per Thorp. Br. Contempts, pl. 5. cites 38 E. 3. 12.

5. Process of contempt issued against a prior for not admitting the valet of the king to a corody, and he came and traversed the patronage of the king, which was found against him, and his temporalities were seiled into the hands of the king for the contempt. Br. Contempts, pl. 18. cites 38 Aff. 22.

6. A man was pursuing his business before the justices of assise, and one R. assaulted him in the presence of the justices, in disturbance of his suit, and by force and arms took his feme from him, and carried her away with his goods and chattels, and was found guilty of all, and was committed to the ward of the sheriff; and of the fine, and of the rest of the punishment, the court would have advice of the counsel of the king, if he should lose his hand or not, *quare ideo*. Br. Contempts, pl. 9. cites 39 Aff. 1.

7. Steward of a leet took indictment of robbery in a leet done at D. where there is no such vill in this county, but in another county, and also indictment of the death of a man which does not belong to the leet, and the party rendered himself, and had writ of the Chancery to remove the indictments into the Chancery, and from thence into B. R. and the lord of the leet sent the indictment, and because he had taken indictment without warrant, and also of the death of a man, which does not belong to the leet, and so purprised upon the king, *capias* issued against the lord to attach him to make fine to the king for him and his steward for the contempt, inasmuch as he was attainted by his own return of the indictment, and he came and made fine to 40 s. quod nota. Br. Contempts, pl. 12. cites 41 Aff. 30.

Br. Parli-
ment, pl. 35.
cites S. C.

8. Office was found that H. of H. was aiding to O. M. enemy of the king, and was seized of such land, &c. and after H. came into parliament and denied that he was aiding, &c. and had restitution, and writ to N. to make livery, who returned that T. S. was disturbed & sicut alias & pluries & causam, &c. and writ to answer the king of the contempt, and he could not excuse himself of the contempt, by which he made fine; and it is a good plea that he had no notice of the contempt till such a day, and then he avoided; for by the justices he is excused before notice, and yet it was by act of parliament, by which issue was taken for the king that he occupied after notice, and he who had restitution prayed judgment of the issues & non allocatur; for this is a writ of contempt for the king only, and H. is not party here, but he shall sue in the chancery, for this is matter. Br. Contempts, pl. 13. cites 43 Aff. 29.

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9. A sheriff returned upon *capias*, that he had taken the body, and put him into the castle of D. and the abbot of M. took him out of the castle,

caple, and *capias* issued against the abbot; *quod nota*: Br. Contempts, pl. 16. cites 13 R. 2. & Fitzh. tit. Return, 74.

10. If a man commences suit against me in bank, and after arrests me in London, &c. by which I bring corpus cum causa, and am dismissed, if this matter may appear, he shall be imprisoned for the contempt. Br. Contempts, pl. 17. cites 9 H. 6. 55.

11. If a juror appears and is challenged, and is tried indifferent, and after makes default when he should be sworn, it is a contempt, and he shall make fine to the value of the land sued for per annum. Br. Contempts, pl. 8. cites 36 H. 6. 27.

Br. Fine post
Contempts,
pl. 28. cites
S. C.

12. *Nen molestando* issued to the mayor of Calice, for the tenants of Mark and Oye there to go toll free, out of Chancery returnable in B. R. and at the plur. *nor causam signific. the mayor would not return the writ*; and by the opinion of the Court clearly; attachment shall issue against the mayor, directed to the lieutenant of Calice, and writ of error lies in B. R. of the judgment given in Calice. Br. Contempts, pl. 7. cites 21 H. 7. 31.

13. The attorney was ordered to stay proceedings, but the defendant proceeded; injunction to bring in the money levied, and to answer the contempt. Cary's Rep. 62. cites 2 Eliz. fol. 92: Sedgewick v. Redman.

14. Walter Jeames made oath, that he banged a subpoena on the door of one Stacy Barry's widow; and that the defendant used to resort thither, as he heard reported before that time, who hath not appeared; therefore an attachment was awarded. Cary's Rep. 79. cites 18 & 19 Eliz. James v. Morgan.

15. The defendant was examined upon interrogatories upon the breach of an order of this Court, and departed without licence, therefore an attachment. Cary's Rep. 148. cites 21 Eliz. Boyle & Hucks v. Vivan.

16. Attachment against witnesses served to testify. Cary's Rep. 161. cites 21 Eliz. Turner v. Warren.

17. Because the defendant maketh oath that he cannot answer without sight of writings in the country, and then puts in a demurrer; therefore an attachment is awarded against him. P. 21 Eliz. Toth. 77. Farmer v. Fox.

18. A. made oath for the serving of a subpoena on a witness to testify on the plaintiff's behalf before certain commissioners, who hath not so done; therefore an attachment is awarded against the defendant. Cary's Rep. 115. cites 21 & 22 Eliz. Middleton v. Sperright.

19. A commission to answer, he returned a demurrer, therefore attachment. Cary's Rep. 142. cites 22 Eliz. Paine & als' v. Carew.

Cary's Rep.
158. S. P.
Farmer v.
Fox. 21 Eliz.

20. A. brought debt in the Exchequer in the court of Common Pleas there, and pending this action he commenced other action in B. R. against the same party for the same cause; per Shute this is no contempt, but Manwood and Fanshaw contra, and shewed precedents. But when a plea is removed out of a base court by writ of privilege, and the party plaintiff in the base court counts in B. R. this is no contempt, and is at liberty to sue where he please. Savil. 14. pl. 36. Pasch. 23 Eliz. Anon.

[445] 21. W. caused a lease to be made by a stranger to B. of a house for years, and then caused B. to bring ejectment against J. S. whom he also procured to answer to the action, and paid the fees to the attorneys of both sides, and this was in order and with an intent to get W. R. out of possession; and because W. *refused to answer interrogatories* he was attached as for a contempt. It was moved for W. that here was nothing executed, but all rested in intent only; but Manwood Ch. B. held that there was more than intent, and *though there was no falsity to the party, yet it is an abuse to the court*, viz. a practice to play all parts and to abuse the officers, and Clench said, it ought to be punished severely; whereupon W. was committed to the Fleet and fined, but as to pillory they would advise. Savil. 31. Mich. 24 & 25 Eliz. pl. 73. White's case.

22. When a *statute imposes a penalty* for a contempt, as the contempt is *personal*, so is the penalty. Arg. Lane, 107. Hill. 8 Jac.

23. *After an habere facias seisinam awarded, executed, returned, and filed, the defendant re-entered and ousted the plaintiff; an attachment was awarded upon affidavit.* 2 Brownl. 253. Pasch. 9 Jac. Gallop's case.

24. This Court directed a trial, and the defendant to avoid the order *procures an injunction out of the Exchequer*, the defendant was committed. Toth. 135. cites Tr. 14 Car. Symmes v. Plowden.

25. A man was committed for *terrifying a witness* who was to be examined at a commission. Toth. 102, 103. cites Tr. 15 Car. Partridge v. Partridge.

26. If a *writ of error* to reverse a judgment in this court is brought and allowed, and notice given of it to the attorney of the other side, and bail put in, and the attorney does *notwithstanding sue out execution*; this is a contempt to this Court. (Trin. 24 Car. B.R.) But it is no contempt if notice be not given to the attorney of the writ of error brought, and bail put in as the statute requires. L. P. R. 306. cites Mich. 1649. B.S.

27. A man shall not be in contempt by *non-performance of any rule of court*, without an actual service of it upon the party, or its being left at his house. Keb. 79. pl. 53. Trin. 13 Car. 2. B. R. Prittman v. Dove.

28. No process of contempt is to be taken out against a defendant *for disobedience of an order*, unless he be served with a *writ of execution of that order* under the seal of the Court. 3 Chan. Rep. 23. Hill. 1667. Moyler v. Peacock.

29. Defendant caused the plaintiff to be *arrested 2 days before* the commission for examination of witnesses and was in execution ordered to be discharged, and the defendant to pay costs and be at the charge of a new commission. 2 Chan. Rep. 22. 20 Car. 2. Smith v. Holman.

30. Where the original cause, on which the process is grounded, is matter of which the court has no cognizance, there a *rescous* can be no contempt. Vent. 1. Mich. 20 Car. 2. B. R. Sparkes v. Martin.

31. A man arrested on a *latitat* gave a *warrant of attorney* to confess a judgment, and presently after *snatched* it out of his hand, to whom it was delivered, and tore off the seal; the court seemed to incline, in regard it was to confess a judgment in this court (B. R.), it was a contempt on which an *attachment* might be granted. Vent. 3. Mich. 20 Car. 2. B. R. Anon.

32. If a *witness will not appear* and be examined upon the return of the subpoena, the party may take an attachment against such witness, and if examined on the other side suppress his deposition. 3 Ch. Rep. 65. per Master of the Rolls, 1670. Anon.

33. One delivered a *copy of injunction* to the defendant, and shewed him the writ under seal, but defendant desired to compare it with the original and see how far he was concerned in it, which being denied, defendant thereupon delivered back the copy, but disturbed the plaintiff's possession. The server of the copy swore he shewed it to the defendant under seal. Per Ld. Keeper, it is a *service* sufficient to ground a contempt, and that notwithstanding it was *irregularly issued* it ought to be obeyed. 2 Chan. Cafes, 203. Mich. 26 Car. 2. Woodward v. King.

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34. *Process was mis-served* by delivering the process to a wrong person, as it appears upon commission to examine the contempt complained of. Per Ld. Chan. there is no reason defendant should lose her liberty upon a mistake of serving process. 2 Chan. Cafes, 100. Pasch. 34 Car. 2. Hammond v. Shelly.

35. Though a *process is irregularly issued* it may be a contempt to disobey it. Prac. Reg. in Canc. 100.

36. Quarter sessions committed Ld. Preston for *refusing to be sworn to give evidence to the grand jury on a bill for high treason*. But on a habeas corpus the court bailed him. Per Holt it is a great contempt, and had he been there, he would have fined him, and committed him till he paid the fine. 1 Salk. 278. pl. 2. Mich. 3 and 4 W. and M. in B. R. The King v. Ld. Preston.

37. *Upon a rule of reference to arbitrators they make an award for the plaintiff, and a stranger by contrivance defeats the party of the benefit of this award*. Per Cur. it is a contempt to the Court, and an attachment shall be granted, for it shall not lie in any one's power to defeat the rules of this Court, or render them ineffectual. 2 Salk. 596. pl. 1. Mich. 8 W. 3. B. R. Sir James Butler's case.

A submission to an arbitration was by rule of Court, and after the arbitrators had made some progress in the

matter, the party came and snatched away the papers, and so hindered farther proceedings; and per Holt, there ought to be an attachment, if the party did not enlarge the rule and pay costs. 7 Mod. 8. Pasch. 1 Ann. B. R. Davila v. Dalmanier.

38. A rule was made *at nisi prius to refer a matter to the 3 foremen of the jury*, and that the plaintiff shall have a verdict for his security; after the award made, an attachment lies for *not obeying the rule of Court*. 1 Salk. 84. pl. 3. Mich. 11 W. 3. B. R. Hall v. Mifter.

39. An *infant brought appeal of murder*, and D. was admitted as prochein amy after the writ was sued out and before it was returnable, The *under-sheriff at the instance of the infant and other*

relations, but not of the prochein amy, delivered back the writ to the infant and his relations. This is a contempt in the sheriff for which he was fined and committed, notwithstanding his clerk in court offered to undertake for the fine. 1 Salk. 176, 177. 12 W. 3. B. R. Toler's case.

40. *Words contra bonos mores spoken of a magistrate in court* is a contempt, for which he may be fined. 2 Salk. 698. pl. 1. Hill. 2 Ann. B. R. in case of the Queen v. Langley.

41. *A. confessed on interrogatories that a copy of a writ* being served upon him, and the writ shewed him, and *before he knew the contents* of it, or out of what court it was, he had spoke with contempt, this was adjudged a contempt. 6 Mod. 43. Mich. 2 Ann. B. R. The Queen v. Crofs.

S. C. cited
3 Wms.'s
Rep. 117.

42. *An infant was inveigled from her guardian* (though he was not assigned by the court) and married to W. yet both the said W, and the parson, and the agents, were all committed by the Master of the Rolls, and the order was afterwards confirmed by the Ld. Harcourt. Cited by the Lord Commissioner Jekyl, 2 Wms.'s Rep. 112. [and said in Marg. to be 22 May, 12 Ann. Hannes v. Waugh].

43. A rule was made to shew cause why an attachment should not be granted for disobeying a toll. 10 Mod. 349. Hill, 3 Geo. 1, B. R. Burgh v. Blunt.

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44. *The inserting an advertisement in the news-papers, offering a reward of 100 l., &c. to any who will discover, and make legal proof of a marriage in question in the Court of Chancery, and which marriage had been before adjudged good in the Spiritual Court, and also in the Court of Delegates, and a verdict given at the bar of the C. B. in its favour, was by Ld. C. Parker held to be a reproach to the justice of the nation, and a thing insufferable, and a contempt of the Court, and that in justice the inserter must stand committed.* Wms.'s Rep. 675; Mich. 1720. Pool v. Sacheverel.

45. *Suing the bail below, while a writ of error is pending in parliament,* is a contempt and breach of privilege. Wms.'s Rep. 685. Hill. 1720. in the House of Lords, Throgmorton v. Church.

46. *Encouraging an infant ward of the Court of Chancery to go from his committees, under whose care the Court had placed him, is a contempt,* Wms.'s Rep. 697. Pasch. 1721. cites it as Dr. Yalden's case.

47. *If in an indictment the prosecutor and defendant enter into a rule by consent, that the master shall take 48 out of the freeholder's book, and each party shall strike out 12 of them, and that the sheriff shall return the residue of the 48 to try the cause at the assizes, and at the trial the defendant challenges the array for want of hundredors, it is a contempt, and an attachment shall be granted.* 2 Ld. Raym. Rep. 1364. Pasch, 10 Geo. B. R. The King v. Burridge.

48. *Marrying an infant ward of the Court* is a contempt, though the parties concerned in such marriage had no notice that the infant was a ward of the Court, 3 Wms.'s Rep. 116. Trin. 1731. Herbert's case.

(B) Punishment thereof.

1. FOR contempt the *defendant shall be imprisoned*, and so it was adjudged there; quod nota. Br. Contempts, pl. 2. cites 44 E. 3. 24. Br. Corody, pl. 2. cites S. C. and 50 Aff. 6,

2. The *original of commitment for contempt seems to be derived from the statute Westm. 2. cap. 39.* for since where the sheriff was to imprison those that resisted the process, the judges that awarded such process must have the same authority to vindicate it; hence if any one offers any contempt to the process, either by word or deed, he is subject to commitment during pleasure, viz. a qua non deliberentur sine speciali præcepto domini regis; so that notwithstanding the statute of magna charta, that none are to be imprisoned, nisi per legale iudicium parium suorum, vel per legem terræ, this is one part of the law of the land to commit for contempts, and confirmed by this statute. Gilb. Hist. of C. B. 20, 21.

3. Upon information that the defendant disobeyed a writ of subpoena brought to be served against her, and that they which should have served the said writ were *beaten and wounded*, therefore an attachment was granted against the defendant, and a subpoena against him, who made the assault returnable immediate. Cary's Rep. 54. cites 1 Eliz. fol. 90. & 97. Rove v. West.

4. Attachment for *not performing a decree.* Cary's Rep. 75. cites 18 & 19 Eliz. Leake v. Marrow.

5. Holgate makes oath, he *left an injunction in the house* of the defendant, and that the defendant, Elizabeth White, Thomas Crimore, and Robert Watkins, have disobeyed the same, therefore an attachment is awarded against them. Cary's Rep. 82. cites 19 Eliz. Holgate & Ux' v. Grantham.

6. The plaintiff *showed the defendant a writ*, but did deliver him neither note of the day of his appearance, neither did the same appear unto him by the schedule, label, or any other paper, and the *defendant appearing found no bill*; it is ordered the defendant be allowed good costs, and an attachment against the plaintiff for such serving. Cary's Rep. 83. cites 19 Eliz. Brightman v. Powtrell. [448]

7. The *defendant being in prison*, and not in the Fleet, *would not make a better answer*, though *two subpoenas were served*, my Ld. Keeper said, let that be deposed, and he should be *shut up close prisoner in what prison soever* he was. Toth. 70. 40 Eliz. Bicket v. Waller.

8. A judgment-creditor brought a *sci. fa. against the principal after the death of the bail, who had paid the debt, and had a release and satisfaction acknowledged*; the whole Court held, that these proceedings were undue, and in contempt of the Court, and therefore an attachment was granted against the creditor. 2 Bulst. 68. Pasch. 11 Jac. Higgins v. Sommerland.

9. In *ejectment* to be tried at the bar, the defendant *pleaded infancy on purpose to put off the trial*, but it was found by sufficient proofs, and by searching the register, that the party was 63 years

old, and thereupon an attachment was granted against him. 2 Bulst. 67. Mich. 11 Jac. Lord v. Thornewton.

10. *Libel* in the Spiritual Court *for tithes*, to which the defendant pleaded a *modus*, and thereupon a *prohibition* was granted, and afterwards the same person *libelled for tithes in the year following*. It was agreed by the whole Court, that if the libel had been for the same tithes after the prohibition granted, an attachment should be against him for his contempt. 2 Bulst. 289. Mich. 12 Jac. B. R. Downes v. Hackesby.

11. About Mich. 9 Car. a *fine* was imposed and parties *pilloried and imprisoned* and laid in *irons* for abusing a man for serving a subpoena in B. R. Toth. 167. Barker v. Shepherd.

12. The plaintiff, after a *verdict* found for him, arrested the defendant, to the intent that he might have him in custody when the judgment was entered, and for no other cause; and this appearing to the Court upon his own confession an attachment was granted against him. Sty. 211. Pasch. 1649. B. R. Lamb v. Duff.

13. The defendant was arrested by a *latitat* directed to the sheriff of Wilts, and thence carried to M. where he was arrested again by a *serjeant* of that town by process out of the corporation-court, and the plaintiff proceeded against him in that court, and not upon the *latitat*, the court granted an attachment against him, nisi, &c. and an *habeas corpus cum causa*. Sty. 239. Mich. 1650. B. R. Brian v. Stone.

14. A rule was made to shew cause why an attachment should not go against a justice of peace who proceeded upon an indictment of forcible entry after a *certiorari* delivered, and fined the party; upon shewing cause, the Court ordered that he should be examined upon interrogatories, and return the *certiorari* and restore the fine, Sty. 359. Mich. 1652. B. R. Staple's case.

15. A witness, who attended the court in a cause there to be tried, was arrested, whereupon a *superedeas* was granted to discharge him, and a rule to shew cause why there should not be an attachment against the person who arrested him. Sty. 395. Mich. 16. B. R. Cullen's case.

16. *Process* of contempt is not to be taken out against a defendant for disobedience of an order, unless he be served with a writ of execution of that order under the seal of the court. 3 Ch. R. 23. Hill. 1667. 23. Anon.

17. Plaintiff told the defendant he was come to serve him with an order from the master of the rolls; whereupon the defendant said, *the master of the rolls kifs my* —. The master ordered an attachment for the familiarity, but said he believed the Lord Keeper would have committed him. 3 Chan. Rep. 41. Hill. 22 Car. 2. Witham v. Witham.

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2 Keb. 711. pl. 87. S. C. adjudged for the plaintiff.

—S. P. adjudged accordingly;

it should have been an attachment, and the defendant should have pleaded *quoddam breve de attachmento*, &c. Mod. 272. pl. 24. Trin. 29 Car. 2. Anon.

18. In action for false imprisonment it was adjudged, that an order of the court of chancery, without a writ of attachment, is not a sufficient warrant to take and imprison a person for a contempt, and in such case the usual course is to award a writ. 2 Saund. 182. Mich. 22 Car. 2. Furlong v. Bray.

19. *Examin-*

19. *Examination* ordered of one in contempt for suffering goods, ordered to be secured, to be carried away, he being there with others at the time. 2 Chan. Cafes, 82. Hill. 33 & 34 Car. 2. Harvey v. Harvey.

3 Chan. Rep. 87. S. C. but S. P. does not appear.

20. If the defendant *hath not appeared*, this Court cannot decree the bill *pro confesso*, but a *sequestration* shall go against his real and personal estate until he clears his contempt. 2 Chan. R. 283. 35 Car. 2. Nodes v. Battle.

21. For any direct and positive contempt a party may not only be taken into custody, but *committed to the Fleet* during the pleasure of the Court. But for a bare contempt in not doing somewhat, then only till he obey and perform; for a contempt in doing somewhat against the order of the Court is accounted much greater than omitting to do somewhat commanded, seeing the one is wilful, the other not always so; and besides what is only not done may be done, but what is once done cannot be undone, though its effects may often be made to cease, or reparation may be made. Pr. Reg. in Canc. 100.

22. Where a defendant was taken or *brought in upon a commission of rebellion*, he was forthwith committed; because he had sate out all the ordinary process of contempt. Pr. Reg. in Canc. 101.

23. On a decree for payment of money after a writ of execution and attachment returned, the Court would not give leave for defendant to be examined, unless he gives *security* to abide the decree. 2 Vern. 91. pl. 87. Mich. 1688. Roper v. Roper.

24. When a man is fined for a contempt to a rule of Court, the party grieved can have but *a third part of the fine*, and it must be returned into the Exchequer, before a *levari facias*; per Holt. Ch. J. And though Sir Samuel Astrey said he had known several precedents where a *levari facias* for a fine hath issued out of the Crown-Office, Holt said that had been much questioned. Cumb. 250. Pasch. 6 W. & M. in B. R. The King v. Cudmore.

25. Rule was made to *put off a trial super solutione custag'* and the costs not being paid, and the trial put off, the plaintiff moved for an attachment, but had it not; for the Court said he should have gone on. 1 Salk. 83. pl. 2. Mich. 10 W. 3. B. R. Anon.

26. Sheriff may take *bail* on an attachment of contempt, but the prosecutor may refuse to accept it. 2 Salk. 608. 13 W. 3. B. R. The King v. Daws.

12 Mod. 579. S. C. On an attachment in execution

after a decree, the sheriff may insist on security proportionable to the duty, but in process it is only 40 l. penalty. Per Guidot Register. Ch. Prec. 110. Pasch. 1700. Danby v. Lawson.

27. Attachment was granted for *proceeding after a certiorari delivered*. 7 Mod. 38. Trin. 1 Ann. B. R. The Queen v. the Mayor of Carlisle.

28. On a motion for an attachment against the defendant, upon affidavit made, that he being served with a rule of Court, to shew cause why an information should not be filed against him, said, *he did not care a fart for the rule of Court*; though it was insisted for him, that he should be first heard to shew cause against it,

it, yet per totam Curiam he shall answer in custody, for it is to no purpose to serve him with * 2 second rule who had despised the first; so he was brought in and bound in a recognizance to answer interrogatories. 1 Salk. 84. pl. 4. Hill. 9 Ann. B. R. Anon.

29. The sheriff cannot take a *bail bond upon an attachment* for a contempt; for it is not within the words or intent of the stat. 23 H. 6. and judgment accordingly. Comyns's Rep. 264. pl. 145. Mich. 4 Geo. C. B. Field v. Workhouse.

30. A motion was made, that one committed for a contempt might be *bailed to answer interrogatories*, but the motion was not granted for default of sureties. And Mr. Masterman said, that formerly the party's own recognizance used to be thought sufficient, but *the Court of late years has always insisted upon sureties*. 2 Barnard. Rep. in B. R. Mich. 6 Geo. 2. B. R. The King v. Clendon.

(C) Attachment stayed. In what Cases.

1. **T**HE plaintiff served one Rolfe with a *subpœna ad testificandum*, and after he was served, before he could be examined, Rolfe was *pressed for a soldier*. Upon oath made hereof attachment was stayed. Cary's Rep. 58. cites Eliz. fol. 3. Humble v. Malbe.

2. If defendant is in contempt *for not answering*, and on motion he *obtains time* to answer, yet if it be not expressly ordered, that all contempts shall be staid, the plaintiff may go on, and *prosecute* the defendant for not answering. Vern. 104. pl. 91. Mich. 1682. Anon.

3. Upon a habeas corpus and certiorari to the sessions, the return was, that it was for *contemptuous words*; but per Cur. it is ill, because they should be *expressed what*, and after filing the return there can be no amendment. Vent. 336. Pasch. 31 Car. 2. B. R. Anon.

4. Where a man is *arrested* upon an attachment, the *contempt* shall hold good, though no affidavit be filed at the time of taking forth the attachment, if an *affidavit* be filed before the return of it. Vern. 172. pl. 166. Trin. 35 Car. 2. Anon.

5. After a *writ of execution* an attachment issued, and then an *injunction for possession*, and afterwards when a *writ of assistance* was moved for, the defendant, upon debate, was *admitted to appear and be examined*. Arg. 2 Vern. 92. Mich. 1688. cites it as the Duke of Norfolk's case.

6. The question was, whether defendant could be heard before he had cleared his contempts, though he offered to pay all plaintiff's demands, principal, interest, and costs. Ordered, that the defendant *bring before the master all that is due for principal, interest, and costs, and then to be at liberty to move to have his sequestration discharged*, but the sequestration not suspended in the mean time. MS. Tab. Feb. 20. 1719. Lord W. v. Osbaldeston.

(D) Attachment and Contempt discharged; by what. And how.

1. J. C. was served with a subpoena by the name of R. C. and J. W. made oath, that he served a subpoena upon R. C. and an attachment was served upon J. C. and ordered that he should be discharged thereof, and might exhibit his bill into this court against the said J. W. and call him in by process to answer his perjury. [451]
Cary's Rep. 103. cites 20 Eliz. Clegge v. Warberton.

2. An attachment and other process of contempt issued out of this court, for not returning the defendant's answer by commission, is discharged, paying the ordinary fees, *because the plaintiff named one commissioner who refused to join with one of the defendant's commissioners in taking the defendant's answer, and a new commission is granted to indifferent commissioners named by the defendants.* Cary's Rep. 113. cites 21 & 22 Eliz. Marshall v. Harwood.

3. G. P. made oath, that where the plaintiff served a subpoena upon him to appear before commissioners to testify on the plaintiff's party, he the said plaintiff did not give or tender him the said G. any money for his charges, and also, that he was sick then, and not able to travel; therefore ordered the said G. be discharged of the process of contempt gotten out against him for not being examined. Cary's Rep. 141, 142. cites 22 Eliz. More v. Worcham.

4. The defendant took out a commission to take his answer in the country, and returned a demurrer, therefore the plaintiff took out an attachment, which this Court liked well, for that the defendant did not directly answer, yet in regard of an oath made of the defendant's impotency, a new commission is granted to take his answer, and discharged of the attachment, paying the ordinary fees. Cary's Rep. 142, 143. cites 22 Eliz. Pain & al' v. Carew.

5. A rule was made to shew cause why an attachment should not be granted against an attorney, who was mayor of N. for issuing out an execution upon a judgment obtained there after a writ of error delivered to him and allowed; but he proving that he was informed by counsel, that the record was not removed thence, by reason of a defect in the writ of error, he was discharged. Sty. 321. Hill. 1651. B. R. Mayor of Newbury's case.

6. Upon a motion for an attachment for that the defendant had put one out of possession who was put in by virtue of an *habere facias possessionem*; it was denied, because it was insisted on by the defendant, that he came in by an elder judgment, and an extent upon it. Sty. 318. Hill. 1651. B. R. Fortune v. Johnson.

7. 13 Car. 2. st. 2. cap. 2. s. 4. *Persons taken upon an attachment for contempt, not to be discharged without a lawful supersedeas.*

8. Subpoena

8. *Subpœna* in nature of a *sci. fa.* to revive a decree; the defendant does not answer, but is examined upon interrogatories to clear his contempt. 2 Freem. Rep. 128. pl. 153. Trin. 1677. Anon.

9. Process issued till proclamation was returned; then came the general pardon. The defendant appeared and demurred. The plaintiff moved to set aside the demurrer; for though the contempt was pardoned, yet the delay was no less to the plaintiff. The lord keeper said that as to the contempt, the defendant stands rectus in curia, and consequently all contempts are likewise pardoned, and therefore ordered them to proceed on demurrer. Chan. Cases, 238. Mich. 26 Car. 2. Anon.

10. An attachment after a decree for dismissal is in nature of an execution at law, and a general pardon may pardon the contempt, but not the debt. Fin. Rep. 253. Trin. 28 Car. 2. Bartram v. Dannett.

But where an attachment was sued out in the time of K. Charles the 2d, and executed 3 days after

11. Upon a motion for a serjeant at arms, on a commission of rebellion returned, the Court held that, by the king's demise, all process of contempt not executed is determined, so that you must begin again at an attachment; but where any process is executed, and a cepi corpus returned, there the process stands good. Vern. 300. pl. 295. Hill. 1684. Anon.

the king's demise, but before notice of his death, the Court on reading the case of *CREW v. VERNON*, in Cro. C. 97. and a precedent in the Lord Keeper North's time, betwixt *VAUGHAN v. BAMPFIELD*, was of opinion that the attachment was well executed, and also well returned, and that the proceeding upon it since was good. Vern. 400. pl. 372. Pasch. 1686. Burch v. Maypowder.

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12. If one is arrested upon an attachment either in process or in execution after a decree, yet in both cases on his appearing before the register, he is to be discharged, and to answer the interrogatories at large, and not in custody, and upon the register's certificate, that the party has appeared, the sheriff is to deliver up the bond. Ch. Prec. 110. Mich. 1699. Danby v. Lawson.

13. If one brought in on contempt denies all upon oath, he is of course discharged of the contempt; but if he has forsworn himself he shall be prosecuted for the perjury; per Cur. 12 Mod. 511. Pasch. 13 W. 3. The King v. Sims.

14. Contempts for acting against an order of the Court discharged, the order being erroneous. MS. Tab. Jan. 28th, 1722. Stone v. Burn.

15. If one in contempt to a serjeant at arms for want of an answer, and then puts in an answer, and the clerk in court accepts the costs of the contempt, this purges the contempt. 2 Wms.'s Rep. 481. Trin. 1728. at the Rolls. Anon.

16. Mr. Masterman said that by the practice of the Court interrogatories need not be filed against a man committed for a contempt till within 4 days after security given by the party to answer them; but the Court held the party's giving security not necessary as he is in custody, and that 4 days should be computed from the time of the party's being sworn to answer them. 2 Barnard. Rep. in B. R. Trin. 5 Geo. 2. Anon.

(E) Where Process must begin De Novo.

1. **D**efendant was in contempt, and *pardoned*, and the plaintiff was compelled to serve a new subpoena to do that which was first ordered. Toth. 10. 3. cites Trin. 37 Eliz. Young v. Chamberlain.

2. If after process of contempt the defendant puts in an *insufficient answer*, and so reported, the plaintiff should not begin as formerly with process at the subpoena, but shall go on to the attachment with proclamation and other process, as if the answer had not been but in. Per Lord Keeper. Chan. Cases, 238. Mich. 26 Car. 2. Anon.

3. One in contempt *to a serjeant at arms for want of an answer*, puts in an insufficient answer, and the clerk in court *accepts the costs* of the contempt, and so purges it. In the process of contempt for the *second answer*, the plaintiff must begin again with an attachment, and not where he left off. But if neither the plaintiff nor his clerk in court accepts the costs for want of the first answer, though tendered, and the *first answer be reported insufficient*, the plaintiff may go on with the process for the second answer, where he left off at obtaining the first. And therefore it is usual and proper for the clerk in court to refuse the costs for want of the first answer, till he is satisfied it is a full answer. 2 Wms.'s Rep. 481. pl. 152. Trin. 1728. at the Rolls. Anon.

Abr. Equ. Cases, 351. pl. 7. S. P. and says this distinction was taken by the solicitor general, and agreed to by the Court as reasonable and agreeable to the printed orders of the Court. Trin. 1728. between

Haftwell and Granger. [And seems to be S. C.]

(F) Pleadings.

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1. **A**ttachment upon a prohibition for suing in the Spiritual Court, for tithes of great trees against the statute, he said that he sued of tithes of *silva cadua*, absque hoc that he sued of other than of *silva cædua*, and no plea, but shall say absque hoc that he sued of great trees. Br. Traverse, per, &c. pl. 311. cites 5 E. 3. 10.

2. In contempt for not admitting varlet of the king to a corody, it was said that it had been a good plea for the prior to the contempt to have said, that there came but one writ of contempt to his hands, quod nullus negavit. Br. Contempts, pl. 18. cites 50 Aff. 6.

3. Attachment upon prohibition, that he held plea contra to the prohibition of the king, and did not count that prohibition was delivered to the defendant, and therefore ill, for the form shall be observed in matters which are not traversable as here, and esplees in formedon, &c. and yet they are not traversable, and this default was pleaded to the count. Br. Count, pl. 11. cites 9 H. 6. 61.

4. Certiorari out of B. R. to the mayor of Winton to certify, &c. who did not return the alias or the pluries, by which attachment upon

* In the year-book it is, viz. the fables give a count in this case, &c. Fitzh. / Count, pl. 34. cites S. C. and there it is, viz. the declaration gives a count in this case, &c.

upon contempt issued to the *sheriff*, and he returned the writ *quod cepit corpus majoris*, who prayed that the king count against him; and because the record and the writ made mention of the delivery of the writs, &c. therefore by the justices he need not count; for the record comprehends the day and place of the delivery of the writs, and all the matter, but by others he shall make count, and the * tales have a count in this action; for the mayor may traverse that no writ was delivered to him *quod fuit concessum*. Br. Contempts, pl. 14. cites 2 E. 4. 1.

5. Bill of attachment upon privilege for goods carried away, was brought by the warden of the Fleet, who had the office in jure uxoris, the defendant said that he is guardian in jure uxoris, and is not so named in the writ, judgment of the writ, and non allocatur; for he is officer, which is sufficient to have the privilege, and the office itself is not here in debate, and therefore the writ awarded good. Br. Attachment, pl. 22. cites 9 E. 4. 40.

6. Debt upon the attachment, the sheriff returned *quod at tachatus est per cattalla ad valenciam 40 s.* and at this day the defendant was *essoigned*, and at the day which he had by the *essoign* he made default, and per tot. Cur. the *essoign* of the goods attached are saved, notwithstanding the default after, *quod nota*. Per Judicium. Br. Forfeiture de Terres, pl. 67. cites 21 E. 4. 78.

7. Contempt shall be answered in proper person and not by attorney. Br. Contempts, pl. 15. cites 22 E. 4. 33, 34.

8. Attachment upon a prohibition, and counted that he delivered a prohibition to the defendant, and yet he proceeded in the Spiritual Court, the delivery of the prohibition is not traversable, but if he proceeded contrary to the prohibition of the king or not. Br. Traverses, per, &c. pl. 370. cites 1 H. 7. 18. in the end of the action debated there arguendo, in the Old Reports, and therefore quære.

For more of Contempt in general, see Certiorari, Costs, Evidence, Prohibition, Sequestration, Striking, and other proper titles.



Continuance and Discontinuance.

(A) [Of Process] To what Time it may be.

[1. UPON an original, a term, or two, or three terms may be mesn between the teste and the return; and this shall be a good continuance, for the defendant is not at any prejudice by it, and the plaintiff may give a day to the defendant beyond the common day if he will. D. 2 Eliz. 175. 23.]

[2. A continuance by capias ought to be made from term to term, and there cannot be any mesn term, because the defendant ought not to stay so long in prison. * 8 E. 4. 13. Per Cumber. † D. 2 Eliz. 175. 23.]

ance, pl. 48. cites S. C. ———† Cro. E. 467. (bis) pl. 17. Hill. 38 Ellis. Arg. cites S. C. and 21 H. 7. 16. and 8 E. 4. 4. S. P.

[3. But by distress a continuance may be made with more than a term mesn. * 8 E. 4. 13. per Cumber. D. 2 Eliz. 175. 23.]

———Br. Continuance, pl. 48. cites S. C. and S. P. as from Mich. to Easter.

[4. If a continuance be made in an inferior court, ad proximam ibidem tenendam, without alleging any day to which it is adjourned; yet if the court be to be held by custom, not at any certain day, as every week, or de tribus in tres, &c. but die lunæ, when the judges thereof please; this is a good continuance. P. 8 Car. B. R. between LAXE AND JESSON adjudged, and a judgment given in Coventry affirmed in a writ of error; this being moved for error.]

And Jones J. said, that all their proceedings in Wales are adjourned till the next great sessions, and none knows when the great sessions shall be held. And it is said that this error was assigned and overruled in the case of Bythel v. Parry.

[5. In writs of execution the justices may give a day at their pleasure. 24 Ed. 3. 31. b.]

[6. As in a scire facias to execute a fine. 24 E. 3. 31. b.]

[7. If a continuance be in an inferior court, that hath power to bold plea de tribus in tres, or any other certain time, and not otherwise, there the continuance ought to be ad proximam curiam, scilicet, and allege the day, otherwise it is not good; and it is not sufficient to say, ad quam quidem proximam curiam, scilicet such a day, &c. because the party ought to know the certain day upon which the entry of the continuance is. E. 8 Car. B. R. between LAXE AND JESSON, in a writ

Fol. 484.

See cit. Return, (T).

Ibid. cites Trin. 15 E. 3. 5.

* Fitzh. Continuance, pl. 3. cites S. C. ———Br. Continuance, pl. 3. cites S. C.

Fitzh. Continuance, pl. 3. cites S. C.

Cro. C. 254. pl. 6. JESSON v. LAXON. S. C. and judgment affirmed by three justices, Crooke dubitante.

Fitzh. Jour. pl. 9. cites S. C.

Fitzh. Jour. pl. 9. cites S. C.

* Cro. C. 254, 255. pl. 6. JESSON v. LAXON. S. C. & S. P. seems to be admitted. — See pl. 4. S. C. & (C) pl. 2. S. C.

* This is a writ of error upon a judgment in Coventry, agreed per Curiam misprinted, and should * D. 9 Eliz. 252.]

be D. 262. b. pl. 32, 33. Trin. 9 Eliz. — S. C. cited Cro. E. 105. pl. 16. Trin. 30 Eliz. B. R. in case of LEAT V. JENNINGS, in which case a judgment was reversed in an inferior court for error, because the distress was awarded returnable at the next court after serving the process, whereas every return ought to be at a day certain, and it may be the process shall not be served within a year, and the defendant is to have day at every court, otherwise the process is discontinued, and therefore judgment was reversed. — S. C. cited 2 Bulst. 37. Mich. 10 Jac. in case of JONES V. SMITH, which was that J. was arrested on process to appear in placito transgressionis at the court of the Marshalsea ad proximam curiam there held, without shewing the day certain when the next court was to be held. Exception was taken that this is too general, for so he may be detained 40 years before any court may be held, and that the day when the court should be held should have been shewn certain; and though it was objected that proxima curia here appears well by their jurisdiction, which is to hold the court de die in diem, and that so the same had been used these 40 years, without shewing the day certain when the court was to be held, yet the whole Court was of opinion that the day ought to have been certainly shewn, and for default thereof the plea was held ill, and the party arrested discharged. — Cro. J. 314. pl. 15. Johns v. Smith, S. C. adjudged accordingly. — S. C. and also D. 262. pl. 33. and Cro. E. Leat v. Jennings, 105. cited Raym. 205. Mich. 22 Car. 2. B. R. in the case of GIBBS V. STRATFORD. But Twisden J. said that the case of Dyer was good enough notwithstanding that error, but the judgment was reversed for other errors, as appears 1 Roll. Abr. 416. pl. 2. Jeffson v. Lazen, sed adjournatur. See Inf. (C) pl. 3. this case. — Mod. 81. pl. 45. Mich. 22 Car. 2. B. R. Anon. Hale Ch. J. said that when in an inferior court the venire facias is ad proximam curiam, it is naught; because it is uncertain when the court will be kept; but if it be at such a day ad proximam curiam, it is good. — In false imprisonment, the defendant justified by process out of an inferior court, which was to take the plaintiff and have him ad proximam curiam; exception was taken to this, and the Ch. Justice doubted that the exception was good, and so the plea ill, because it ought to be on a day certain; but the other justices e contra, and judgment for the defendant. 2 Mod. 58, 59. Mich. 27 Car. 2. C. B. Crowder v. Goodwin.

[8. Continuance of a plea cannot be by one term or more mesne, upon the prayer of the defendant. M. 15 Jac. B. R. between SHOTBOLT AND LEECH, per Curiam agreed.]

§ S.C. cited by Roll Ch. J. as adjudged. Sty. 339.

[9. But the continuance of a plea, upon advice of the Court, by a term or more between, is not good. M. § 1 Car. at Reading-term, B. R. between NORRIS AND JOHNSON, in a writ of error upon a judgment given in Banco, it was adjudged to be a discontinuance, where the case was, that in trespass in Banco the defendant pleaded a special plea, upon which the plaintiff demurred, and the Court, upon an advisare vult, gave day from Easter-term to Michaelmas-term, intermitting Trinity-term, and therefore adjudged to be a discontinuance, and the judgment reversed accordingly; because if this should be allowed, the Court might delay men perpetually, for as well as they might intermit one term, they might || intermit one year, or twenty years. Contra M. 15 Jac. B. R. between SHOTBOLT AND LEACH, per Curiam.]

|| Fol. 485.

Sty. 339. S. C. adjudged.

[10. If a man declares in an action upon the statute of monopolies, as the king's patentee of soap, and after the defendant in Easter-term pleads, that the king did not make any such letters patents, and issue is joined thereupon, and day given to the plaintiff till Michaelmas-term, but there is no continuance between Easter and Trinity-term, it is a discontinuance, for though the Court might give day to bring in the letters patents in Michaelmas-term, omitting Trinity-term, yet there ought to be a continuance between Easter and Trinity-term by a Curia advisare vult, till Trinity-term, or otherwise it is a discontinuance. Tr. 1652. between FRIEND AND BAKER adjudged.]

11. The defendant being to go to the marches of Scotland with the king, to aid him in his war, the king by writ commanded the justices to continue the plea till his (the king's) return. The judges notwithstanding proceeded to judgment against the defendant, and the judgment was affirmed in error; for every continuance must be to a day certain, whereas the king's return is uncertain. Jenk. 7. pl. 10. cites Mich. 3 E. 1. f. 29. [but it should be f. or pl. 24.] Cressley's case.

12. *Attaint* in B. R. was not discontinued, because he had a longer day than the common day; for this is the delay of the plaintiff himself. Br. Jours, pl. 43. cites 15 Aff. 6. and 6 E. 3. accordingly.

Br. Discontin-
uance de
Process, pl.
28. cites
S. C.

13. In *quare impedit*, they were at issue upon traverse of the presentment, by which the plaintiff claimed, and the plaintiff prayed day by 12 weeks, and the defendant prayed day by 15 days, and the longest day was given according to the prayer of the plaintiff; quod mirum! Br. Jours, pl. 43. cites 21 E. 3. 29.

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14. In *assise*, writ was awarded to the bishop to certify whether bastard or mulier, and the parol was not without day, but day given to the parties *ad proximam sessionem & interim quod sequatur breve episcopo ad certificand*, at which day the bishop did not certify, and *sicut alias* was awarded, and day was given over to the next sessions. Br. Jours, pl. 46. cites 38 Aff. 30.

15. In *trespass*, they were at issue, and the plaintiff took day by a year, and the other alleged it for discontinuance of process, and yet good by award; for the plaintiff may delay himself. Br. Jours, pl. 16. cites 46 E. 3. 16.

S. P. Br.
Discontin-
uance de Pro-
cess, pl. 16.
cites 46 E. 3.
26.

16. *Trespass* against two, the one appeared and pleaded to issue, and the other made default, and day was given to him who pleaded by a year, yet no discontinuance by award, by reason that the plaintiff may delay himself without offence, by award. Br. Discontin-
uance de Process, pl. 7. cites 46 E. 3. 26.

S. P.
Ibid. pl. 23.
cites
21 H. 7. 16.
— In an-
taint, it was
no discon-

tinuance in B. R. because he had longer day than the common day; for this is the delay of the plaintiff himself. Ibid. pl. 28. cites 15 Aff. 6. and T. 6 E. 3. accordingly.

17. A man outlawed sued charter of pardon, and *scire facias* against the plaintiff, who pleaded to issue, and after he who was outlawed said, that there were only two *capias* before the exigent which appeared of record; and by some, by the suit of the pardon he affirms the record, and cannot take advantage of discontinuance, and by some it is ill continuance; and after he found mainprize, and therefore it seems that it is admitted to be discontinuance. Br. Utlagary, pl. 62. cites 3 H. 4. 10.

18. If the plaintiff counts in debt or trespass, and the defendant pleads to the jurisdiction, or if continuance be taken to another term, it shall be made upon the writ as if no continuance had been made, and no continuance shall be entered, and at the next term the plaintiff shall count de novo; per Babb. Br. Continuance, pl. 23. cites 8 H. 6. 18.

19. Note, per Cumberford prothonotary, that *capias*, nor continuance by *capias*, can have day only from term to term, by reason of

of the imprisonment; but *contra* of distress, for this may over-pass a term; as of issue in Mich. term returnable term. Pasch. Br. Jours, pl. 71. cites 8 E. 4. 14.

20. In *attaint*, the *grand jury* appeared, and the Court by assent of the parties gave day to them, and to the *petit-jury de termina Pasche* in 15 *Johannis* in termino *Trinit'*, that the parties may come to agreement in the mean time. Br. Jours, pl. 56. cites 21 E. 4. 23.

D. 258. a.
b. pl. 16.
Hill. 9 Eliz.
S. C. but
S. P. does
not appear.

21. An *exigent* may be awarded in *Easter-term* returnable in *Michaelmas-term*; for the nature of the writ requires it; because otherwise in the short term 5 counties cannot be held, and therefore though a term mesne be left out, yet the writ is good, and well continued. Dal. 104. pl. 43. anno 15 Eliz. Pollard v. Paine.

22. So a *grand cape* in a real action requires 9 returns, and therefore if it be awarded in *Easter-term*, it shall be returnable about *Craft Animarum* in Mich. term, and though a term be left out, yet it is good enough, because the return of the writ requires it. Dal. 104. in S. C.

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23. A judgment in an inferior court was reversed for error, because the *distress* was awarded returnable at the next court after the serving of the process; whereas every return is to be at a day certain; and it may be the process shall not be served within a year, and the defendant is to have day at every court, otherwise the process is discontinued; and judgment was reversed. Cro. E. 105. pl. 15. Trin. 30 Eliz. B. R. Leat v. Jennings.

S. C. cited
Arg.
a Mod. 59.
which see in
the notes at
pl. 7. held
contra by 3
justices,
Hale dubitante.

24. Error of a judgment in the Court of H. the judgment being in debt by *nihil dicit*; the error assigned was, that after imparlance day was given to the parties till the next court, and no day certain, and for this cause it was holden a discontinuance, and the judgment reversed. Cro. J. 571. pl. 12. Pasch. 18 Jac. B. R. Adams v. Flyth.

25. In trespass in C. B. after a plea, replication, and demurrer, the entry was, *Curia advisari vult* from *Hillary-term* to *Trinity-term*, leaving out *Easter-term*; it was insisted that this might well be done, because it is the act of the Court, and they may take so much time to advise before they give their judgment. But per Doderidge J. though a particular continuance by *dies datus* may be by leaving out a year, because the plaintiff may delay himself, yet a term cannot be left out, because it is in delay of justice; so the plaintiff may purchase an original returnable 2 or 3 terms after, because it is in his own delay; but if he was to purchase a *capias* it is otherwise, because the other should be imprisoned for all the time, and therefore he cannot leave out a term; to which Ley Ch. J. agreed, and said that C. B. cannot give other than common day where the suit is by original, but otherwise in B. R. for the suit is by bill, but if in B. R. the suit be by original, yet we cannot give other than common day; and staying a cause without giving a day when it shall be revived, or if we give a day too long, viz. omitting a term, this is in delay of justice; for it may

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may be the Court shall be resolved of their judgment before this day, and yet they cannot give it, and so this is against the statute of magna charta. 2 Roll. Rep. 442: Trin: 21 Jac. B. R. Johnson v. Norton.

26. A *latitat* may be continued from time to time till the bill filed to prevent the statute of limitations, otherwise it is not good, which continuances may be made by attornies at their chambers; per Cur. and Twisden J. said, that he had known an action was continued by *latitat* 5 years before the bill filed; and Herne secondary said, that a *latitat* may be continued 7 years. Sid: 53: Mich. 13 Car. 2. B. R. in case of Dasy v. Clinch.

27. Upon an indictment of perjury, it was said per Cur. that at the same assizes the judges may adjourn to a day certain; but if there be a continuance over to the next assizes, there must be no day expressed. But inferior courts cannot make a continuance ad proximam curiam, but always to a day certain. Vent. 181. Hill. 23 and 24 Car. 2. B. R. The King v. Serjeant and Annis.

* See pl. 7 and the notes there

28. Error assigned of a judgment from C. B. that there was a miscontinuance, the continuance being from one day to another in the same term, which was urged could not be, the term being but one day in law; but over-ruled; another error was, that the time of imparlance was to *quind' Pasch'* instead of *die Pasch'* in *quindecim dies*, quod etiam fuit rejectum. Per Cur. 12 Mod. 703. Mich. 11 W. 3. Pierfon v. Hulls.

a Lutw. I 38. PEARSON v. HULLS. S. C. says that the discontinuance insisted upon was, that the re-

cord was a record of Pasch. 11 W. 3. and it appears by the defendant's plea, that there was an imparlance to octavas Hillarii before, and it does not appear that there was any continuance from this term of Easter. But the Court being informed that the declaration was in Mich. term before, with an imparlance to octavas Hillarii, leave was given to amend the record, and to make it agree with the fact of the case.

(A. 2) Continuance and Discontinuance. In what Cases; How, and When. [458] See (B).

1. IF a man appears and imparles, he shall not allege discontinuance of process after. Br. Discontinuance de Process, pl. 48. cites 38 E. 3. 2.

2. If *replevin* be removed out of the county into Bank by recordare, discontinuance of process in the county is no plea in Bank; for nothing is removed into Bank, nor of record there, but the plaint only; quod nota. Per tot. Cur. Br. Discontinuance de Process, pl. 45. cites 3 H. 6. 30.

3. If *pone* comes to the sheriff after the county pass, yet he may give day to the party, though it be not in full county; per Brian, to which Catesby agreed, and that if the plaintiff shall be nonsuited in the county, it shall serve the *pone*; for it is not in full county as recordare is. Per Littleton, if the plaintiff appears it is no error, as where a man appears by capias in an action, in which capias does not lie, this is not error. Br. Jours, pl. 54. cites 12 E. 4. 11.

L 1 2

4. Note,

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4. Note, that *after the tenant has vouched in præcipe quod reddat*, and the vouchee has entered into the warranty, no discontinuance shall be against the tenant, for he is out of court and the vouches is in his place, to which vouchee day shall be given, and not to the tenant. Br. Discontinuance de Procefs, pl. 40. cites 1 E. 5. 4.

Though a writ of error is but a commission to examine the errors, and may lodge in court 7 years without being discontinued,

5. A writ of error may sleep several years without a discontinuance, for it is only a commission to the judges to examine the record, and the parties have no day in court till the plaintiff in error sues a *scire facias* ad audiendum errores, or the defendant in error sues a *scire facias* quare executionem habere non debet. After such *scire facias* the writ of error may be discontinued, and errors may be assigned upon either of those *scire facias*. Jenk. 25. pl. 48.

yet after the parties have once proceeded upon it, it may be discontinued as well as any other action. Per Popham. Yelv. 4. Trin. 44 Eliz. B. R. in case of Cromwell v. Andrews. — Writs of error are rarely discontinued, but sometimes they may be; per Holt Ch. J. and ordered the other side to shew cause why a writ of error brought to reverse a fine should not be discontinued. 5 Mod. 75. Mich. 7 W. 3. Winchurst v. Masely.

6. In a *qua. imp.* brought by the queen, she did not prosecute the suit. Periam said, that *after a year the defendant may have it discontinued*, but that the queen shall not be nonsuit. And in the case of a common person the plaintiff may discontinue it *within a year*, but the defendant cannot discontinue it *till after the year*. Gouldsb. 53. pl. 3. Trin. 29 Eliz. Anon.

A man may be nonsuit without leave of the Court, but he cannot discontinue his suit without their consent;

7. In a *replevin* the plaintiff cannot discontinue his suit without the privy of the Court; for the entry is *recordatur per Curiam*; and if he would discontinue without moving the Court, the defendant may enter the continuance if he will; agreed per tot. Cur. Le. 105. pl. 142. Mich. 30 Eliz. C. B. Bear v. Underwood.

agreed, Mar. 24. pl. 54. Pasch. 15 Car. Utbart v. Parham.

Plaintiff prayed leave to discontinue paying costs, though it was after demurrer argued, and the Court gave leave, though it was in an action of debt for an escape. Quod nota. Sid. 306. pl. 14.

8. In *debt on an obligation* against an executor, *demurrer was joined and argued*, and rule was given to enter judgment for the defendant; whereupon the plaintiff moved that there was not any continuance entered on the roll, and therefore prayed that it might be discontinued; but per Cur. the plaintiff cannot discontinue it without the Court's direction, and the defendant may well continue, it being for his advantage,* and ordered the continuances to be entered accordingly; for otherwise, in every case when a matter is argued on demurrer, the plaintiff seeing the opinion of the Court against him will cause a *discontinuance* to be entered, which *ought not to be in the same term it is argued*. Cro. J. 8. pl. 10. and 35. pl. 8. Trin. 2 Jac. B. R. Phillips v. Echard.

Mich. 18 Car. 2. B. R. Jones v. Pope. — Lev. 191. S. C. accordingly; for the sheriff shall not go unpunished for the escape, for a fault in the declaration. Saund. 37. S. C. accordingly. — It has been allowed after a joining in demurrer, but not after arguing such demurrer; per Cur. 5 Mod. 203. Pasch. 8 W. 3. in case of Keat v. Barker.

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9. The *prothonotaries* said, that in *trespass* the plaintiff might discontinue his action within the year if it be before any plea pleaded; but the justices held *e contra*, because then costs which are given by the statute should be lost. Godb. 219. pl. 318. Mich. 11 Jac. C. B. Anon.

defendant cannot discontinue it till after a year. And after a year it may be discontinued in case of the king where he is plaintiff, but he cannot be nonsuited; per Periam. Gouldsb. 53. Trin. 29 Elis. The Queen v. Leigh.

In the case of a common person, the plaintiff may discontinue within a

year, but the

10. In debt on an obligation, the plaintiff did not sufficiently allege the breaches, whereupon the defendant demurred, and rule was given to enter judgment for the defendant; but afterwards the Court gave day to the next term and leave to the plaintiff to discontinue his suit, because otherwise he should be utterly barred of his bond. Cro. J. 488. pl. 8. Trin. 16 Jac. B. R. Lee v. Fydge.

Like point. Cro. Car. 195. pl. 6. Trin. 6 Car. B. R. Harlow v. Wright.

11. In debt on bond for quiet enjoyment it was resolved on a general demurrer, that the defendant's plea was not well set forth, but for a flaw in the plaintiff's replication, for that it did not well allege the entry of the defendant so as it did not appear that he was interrupted by him, the opinion of the Court was against the plaintiff; but the next term, by leave of the Court, he discontinued his action. All. 19, 20. Trin. 23 Car. B. R. Coleman v. Painter.

12. It was moved, that the plaintiff paying costs, might have a rule to discontinue his action, because such a traverse was taken that the title of the land in question could never come to be disputed. Roll Ch. J. said they might do this by the course of the Court without motion; but he conceived the reason of the motion was because there was a preremptory rule of Court to try the cause the next term, and so that the motion was to avoid the contempt he might fall into for disobeying the rule if he should not go on to trial; but said, that paying good costs he should discontinue his action; quod nota. Sty. 366. Hill. 1652. Anon.

13. A man may not discontinue in action of *trespass*; per Roll Ch. J. Sty. 382. Pasch. 1653. in case of Ayre v. Hawksworth.

14. It was said, that if in debt or covenant, after a demurrer joined, the Court sees cause they will give leave to discontinue, if the plaintiff through his negligence is in danger of losing his debt, and this several years after the action brought; but after the demurrer argued, they will not give leave to discontinue, nor where he has brought another action for the same cause, and this is pleaded in abatement of the first action. Sid. 84. pl. 11. Trin. 14 Car. 2. B. R. the Lord Howard's case.

15. Though discontinuances are permitted in case of bonds for payment of money, yet they never are in case of bonds for performance of awards, unless upon extraordinary occasions. Lev. 139, 140. Mich. 16 Car. 2. B. R. in case of Bean v. Newbury.

16. In debt on an obligation the defendant traversed an immaterial traverse of the plaintiff's; the plaintiff demurred, whereupon there was a rule for judgment for the defendant nisi, &c. Whereupon the plaintiff prayed leave to discontinue, which the Court took time to consider of, and afterwards because the defendant would not

Saund. 20. 23. S. C. and the Court gave the plaintiff liberty to discontinue

his action upon payment of costs, though it was after they had delivered their judgment. — 2 Keb. 64. pl. 16. S. C. adjournatur. — Ibid. 105. pl. 39. S. C. adjudged for the defendant, but the Court gave leave to discontinue.

Sid. 340. pl. 4. Heyman v. Gerard, S. C. but says nothing as to the discontinuance. — Saund. 102. Hayman v. Gerard, S. C. but nothing as to the discontinuance.

17. In debt on bond to account and pay all monies which should come to his hands, the defendant pleaded that no money came to his hands; the plaintiff replied, that money came to his hands, but did not say that he had not accounted or paid, and therefore the Court held it insufficient, and therefore judgment was ruled to be given against the plaintiff; but he then prayed leave to discontinue, which was granted, unless the parties would submit the truth of the matter to their counsel to be determined by them. Lev. 226, 227. Mich. 19 Car. 2. C. B. Hegman v. Gerard,

18. In a quo warranto against the town of Farnham, for using a fair and market, and taking toll, &c. issue was taken, whether they had toll by prescription or not, and it was found that they had; but it was moved in arrest of judgment, that here was a discontinuance, because there was no issue as to the other liberties claimed by them, (viz.) a fair and market, and this action is not helped by the statute of jeofails, quod fuit concessum; but the Ch. Baron said, that they were too soon to urge that, because judgment was not yet given, and before judgment there can be no discontinuance against the king, because the attorney general may get proceed, by the king's prerogative, to take issue upon the rest, or may enter a nolle prosequi, but if he will not proceed the Court may make a rule on him ad replicandum, and so there may be a special entry made of it; wherefore non allocatur. Hard. 504. Pasch. 21 Car. 2. in the Exchequer, Attorney General v. Farnham Town.

19. Keeling said, that a man may discontinue his action in B. R. before an action brought in C. B. But if he do begin in C. B. and then they plead another action depending in B. R. and then they discontinue, he took it that the attorney ought to be committed for this practice. Mod. 41. pl. 90. Hill. 21 & 22 Car. 2. B. R. Anon.

Mod. 42. pl. 95. S. C.

20. In debt on bond to perform an award, but in the replication the plaintiff mistook the day of the tender of the award, and upon demurrer, rule was given for judgment for the plaintiff; but upon exception taken the plaintiff prayed leave to discontinue on payment of costs, and because the misprision was in so petit a matter, and the plaintiff had a just debt, the Court gave leave to discontinue the action on payment of costs. Saund. 73. Pasch. 22 Car. 2. Roberts v. Marriot.

Sid. 465. pl. 11. S. C. but the point of discon-

21. In assumpsit for money due on account stated between merchants, the defendant pleaded the statute of limitations, but upon argument it was doubted, whether it appeared sufficiently upon

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the declaration that the account was stated; and after the plaintiff prayed leave to discontinue, and it was granted though *after argument*. Lev. 298. Mich. 22 Car. 2. B. R. Martin v. Delboe.

tinue does not appear. — Mod. 70. pl. 24. S. C.

but nothing said of the discontinuance,

22. In *debt upon obligation for performance of covenants*, the Court permitted the plaintiff to discontinue *after argument*, and though the action was brought for the penalty. 2 Lev. 124. Hill. 26 & 27 Car. 2. Rea v. Barnes.

23. Court will not give leave to discontinue *after a verdict*, unless the verdict be set aside as an *ill verdict*; but in the principal case the verdict was not blamed; however, for fuller satisfaction, a new trial was granted. Cumb. 233. Hill. 5 W. & M. in B. R. Broom v. Roberts.

After issue joined, or a verdict given, the plaintiff cannot discontinue

without leave of the Court, which is never granted but upon payment of costs. G. Hist. of C. B. 219.

24. After a *writ of inquiry returned* the plaintiff cannot have [461] leave to discontinue; per Eyre J. *absente Holt*. Comb. 261. Pasch. 6 W. & M. in B. R. Reeve v. Goldega.

25. The plaintiff brought an *action for 400l. for so much money had and received* of him by the defendant, who *pleaded an attainder of high treason in abatement*; the plaintiff *replied, that after the attainder, and before the action brought, he was pardoned, unde petit judicium & damna sua*; and upon demurrer per Cur. the replication is *ill concluded*, for the words *damna sua* should have been left out, and of that opinion was the Court, and therefore rule was made that he might discontinue without costs. 3 Mod. 281. Pasch. 2 W. & M. in B. R. Biffe v. Harecourt.

1 Salk. 177. pl. 1. S. C. held that there was a discontinuance by the non conclusion of the replication; for an ill prayer of judgment is as none. —

Show. 155. S. C. held per Cur. to be a discontinuance. — Carth. 137, 138. S. C. resolved that this improper conclusion of the replication made it ill; for all the pleading was discontinued, because the plea was in disability, and so concluded; and the replication was concluded as a plea in bar, and so no manner of answer to the plea, but a replication at large, and as none at all; so that all is discontinued for default of a replication. But if it had been concluded generally, viz. *petit judicium &c.* that might have been good. So the rule of Court was, that the plea was discontinued, and not that the bill shall abate; quod nota. — S. C. cited Ld. Raym. Rep. 338, 339.

26. Discontinuance *by leave of the Court* may be after *special verdict*, but not after general verdict; for in the case of a general verdict it would be the having as many new trials as the plaintiff pleases; but a special verdict is not compleat and final; but even in that case it is a great favour, 1 Salk. 178. Pasch. 8 W. 3. B. R. Price v. Parker.

The Court doubted if they could give leave to discontinue after verdict. 2 Keb. 695. pl. 38. Mich.

22 Car. 2. B. R. Holford v. Boord. — After verdict the Court gave the plaintiff leave to discontinue, paying costs. Raym. 389. cites Mich. 1653. B. R. Elston v. Drake. — See (D) pl. 1. — It has been allowed after a *special verdict* and an *argument at bar*, per Cur. 5 Mod. 208. in case of Keat v. Barker. — Comb. 363. Pasch. 8 W. 3. B. R. Eaton v. Barker. 6 C. & S. P. accordingly.

27. In error, want of original was assigned for error, the original having been *lost upon the death of plaintiff below's attorney*; upon *affidavit* of this fact the lord keeper granted them a new original, and that should be certified, and a certiorari being brought,

Ld. Raym. Rep. 330, 331. S. C. but S. P. does not appear. —

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Ibid. 693.
Leving v.
Calvry,
S. C. and
the case of
NAYDON v.
WINTER-
BOTTOM
was there
cited; and
as to the ob-
jection that
the plaintiff
in error
would lose

and the original being certified, now the defendant in error would bring on the matter, in order to have his judgment affirmed, and costs; and now it was moved that this would be very hard upon the plaintiff, who at the time of the writ of error brought had good cause, though that were now cured by a new original; and for this the case of NAYDON AND WINTERBOTTOM, about 3 years before, was cited. But per Cur. the plaintiff cannot discontinue his writ of error without leave of the Court; for if you do not assign error we will affirm the judgment, and the Court will make no rule. 12 Mod. 561. Mich. 13 W. 3. Sir Richard Leving v. Lady Calvry.

As to costs if the judgment should be affirmed, Holt Ch. J. said, that if the lord keeper had been of opinion that the plaintiff ought to have had his costs, he would not have granted the liberty of filing an original before costs were paid by the defendant, and the motion was denied.

28. In debt the declaration was of Michaelmas term, and the plea-roll of Easter term, and no continuances entered; and upon demurrer this was shewn to the Court as a discontinuance, but they said that the practice is never to enter continuances till the plea-roll is made up, though the declaration be of 4 or 5 terms standing. 1 Salk. 179. pl. 7. Pasch. 2 Ann. B. R. Curluis v. Padley.

29. Plaintiff cannot discontinue after rule for judgment nisi, &c. and then a peremptory rule for judgment for the defendant. 1 Salk. 179. Pasch. 2 Ann. B. R. Turner v. Turner.

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30. After special demurrer, plaintiff had leave to discontinue on payment of costs. 6 Mod. 82. Mich. 2 Ann. B. R. Williams v. Farrow.

31. An original was 7 Geo. and the declaration was 9 Geo. and no continuances entered between the one and the other. This being moved in error of judgment given for the plaintiff, it was answered that the continuances might be entered at any time, and that when entered, the plaintiff is entitled to his judgment. The Court was of opinion that the attorney ought to be punished for making up a second record, but that the plaintiff must have his judgment, 8 Mod. 243. Pasch. 10 Geo. 1. Hawker v. Hinton.

(A. 3) Continuance. In what Cases it must be; and how many Days must be given.

1. IN attaint, when the parties have day in court upon verdict to hear their judgment, the judgment shall not be given till the 4th day, and the attaint ought to bear teste after the 4th day of the judgment, and if not it shall abate. Br. Jours, pl. 42. cites 9 Aff. 21.

2. Quod permittat was brought of the plaintiff's own seisin in the debet & solvet, and counted of being disturbed of his way, and the defendant demanded the view and had it; and upon the view he had day as in plea of land, because it is to recover inheritance; and after appearance, upon a default, a distringas shall be awarded in lieu of a petit cape, and thereupon he shall have day,

as in plea of land. Adjudged, &c. Fitzh. tit. Jour, pl. 35, cites Trin. 30 H. 6. 8.

3. *Pone* was sued by the defendant in replevin, to remove, &c. and the writ was *et dic. prefato querent' quod sit hic tali die*, &c. and there were not 15 days between the teste and the return, and therefore was challenged; per Littleton it is good; for before the statute of York, a man need not have 15 days in any case, and the statute is in attachment and distress, &c. and this *pone* is at the common law, and (*dic. querent'*) is only to give prefixion to the plaintiff; as in London the tenant vouched a foreigner, and they gave day to them in Bank, this need not to have 15 days. Per Brian (*dic.*) countervails a summons, therefore ought to have 15 days; but *contra* in writ of error, there is no process, but the process shall be by *scire facias* after, and (*dic. quer'*) is to give garnishment to the plaintiff, and is not like to foreign voucher, which Chock agreed. Br. Jour, pl. 54. cites 12 E. 4. 11.

4. Per Jenney, *venire facias* to be viewed against an infant need not have 15 days. Ibid.

5. And in aid prayer by baron of the *feme*, he need not have 15 days. Ibid.

6. But *pone* sued by the plaintiff ought to have 15 days; for this has summons against the defendant and others, when it is sued by the defendant; for then it is *dic. quer'*, which was agreed by the clerks. Ibid.

7. If *assise* is brought against 4, and judgment is given against them, whereupon all the 4 bring a writ of error, and upon a *scire facias* quare executionem habere non debet one of them only appears, and the rest make default, and he that appears assigns errors by himself, and the defendant in the writ of error pleads in nullo est erratum, the writ of error is discontinued; and in this case, he that appeared ought to have prayed process ad sequendum simul; and thereupon judgment of * severance ought to have ensued; per Popham. Yelv. 3, 4. Trin. 44 Eliz. in case of *Jd. Cromwell v. Andrews*.

Cro. E. 391, 8:2. pl. 3. Andrews v. Lord Cromwell, S. C. and the Court held that this assignment by one only per se, without suing a summons and severance of

the others, is as null and void; and therefore, though the writ be good, yet they would award execution; for the writ of *scire facias* quare executionem habere non debet is as a spur to cause the plaintiffs to assign the errors; and when it is returned *scire feci*, and nothing done thereupon (for this assignment of errors by himself only is as if nothing had been done thereupon), execution shall therefore be awarded; and though there was now a year passed after the return, and at this time no judgment is, that there shall be execution, nor that any continuance was entered, yet it is not material, for there never shall need any other *scire facias* to be awarded, but execution shall be taken, when there is an apparent default in the plaintiff that he would not assign his errors; and therefore the writ was abated, and execution awarded.——Noy, 44. S. C. but S. P. does not appear.

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8. Error of a judgment in C. B. for that the defendant being then and now an infant appeared by attorney, and not by guardian; he was admitted by his guardian to assign that for error; it was moved that the writ of error was discontinued, because the entry is, *ad quem diem predict.* Carre per attornatum suum infra script. where it ought to be *per custodem suum*, &c. and three justices *ceteris absentibus* were of that opinion; wherefore the plaintiff prosecuted a new writ of error. Cro. J. 250. pl. 2. Mich. Jac. B. R. Carr v. Baker.

9. Debt

9. Debt was brought upon four bonds to pay money; three of the actions were tried in London in Trinity term, and the fourth was tried at Lent assizes afterwards, and there was not any continuance from Trinity term to Lent assizes, which was much insisted upon, yet judgment was given for the plaintiff. Cro. J. 529. in pl. 8. cites Pasch. 10 Jac. B. R. Rot. 104.

10. It was said by the prothonotaries, that if a *nihil dicit* is entered in Trinity term, and a writ of enquiry of damages issues the same term, that there needs not any continuance; but if it be in another term it is otherwise. The Court said, if it were not the course of the court they would not allow of it, but they would not alter the course of the court. The words of continuance were, quia vicecomes non milit breve. Godb. 195. pl. 280. Trin. 10 Jac. C. B. Wetherell v. Green.

11. An *elegit* taken out once may be continued 7 years; agreed per Cur. Keb. 159. pl. 110. Mich. 13 Car. 2. B. R. in Welton's case.

(B) What shall be a Discontinuance.

The course of B. R. is, that the plaintiff or defendant may continue the plea after they have put themselves on the judgment of the court upon demurrer; but this ought to be pending the plea; per Doderidge J. and affirmed by others. 2 Roll. Rep. 113. Trin. 17 Jac. B. R. Anon.

[1. THE course of the court of King's-Bench is to enter no continuance upon the roll after issue or demurrer, and then to enter the continuance of all upon the back before judgment. Tr. 16 Jac. B. R. Sir GEORGE TRENCHER's case, by the clerks, M. 31, 32 Eliz. B. R. between RUSSEL AND PRAT, by the clerks, and if it is not entered, it is error. See the principal case, P. 16 Jac. B. R.]

Mo. 403. pl. 537. S. C. by the defendant's claiming property the plaintiff may have writ de proprietate probanda, without continuance of the replevin, though it be 2 or 3 years after; because by the claim of property the first suit is determined. — Cro. R. 468. (bis) pl. 26. S. C. but S. P. does not appear. — See tit. Default (E), pl. 1, 2. S. C.

[2. If a *pluries replevin* be returned in Michaelmas term, that the defendant claimed property, and after nothing is done, nor any appearance nor continuance till Easter term after, at which term they appeared and pleaded, and judgment was thereupon given; though no continuance was between Michaelmas and Easter, yet this is not any discontinuance, because there is not any continuance till* appearance; for the parties have not any express day in court, and where there is not any continuance, there cannot be any discontinuance. Tr. 38 Eliz. B. R. between GAWEN AND LUDLOW adjudged.]

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Cro. C. 236. pl. 17. Lakins v. Lamb, S. C. and judgment affirmed; for by the finding the verdict, that

[3. In a *quare impedit* in Banco against two, one pleads to issue, and the other demurs, and a verdict is given against him who pleads to issue, and after several continuances are made upon the demurrer, but no continuance is made upon the verdict till judgment is given, but after judgment is given upon the verdict, and also upon the demurrer, for the plaintiff, yet this is not any discontinuance, for it is not the use to make any continuance after verdict till judgment. M. 7 Car. B. R.

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B. R. between **EKINS** AND **SIR JOHN LAMBE** adjudged in a writ of error, which intratur Trin. 7 Car. Rot. 1165.]

found, is out of court, and no day shall be given to a defendant against whom a verdict is found; because he has no day in court to plead any thing; but in this case day is only given to him who is to plead to the demurrer.

[4. In an *ejectione firma*, if the defendant at the day of *nisi prius* at the assizes pleads, that the plaintiff entered into parcel of the land, pending the writ, and the justices of *nisi prius* accept the plea, and dismiss the jury, though they do not give any day to the parties in Banco, yet this is not any discontinuance, although the plea is collateral; for the day of *nisi prius*, and the day in Banco are but one day; for the Court in Banco gave day to the jurors in Banco, *nisi prius* justiciarii ad assisas venerint, and to the parties day is given there absolutely. **M. 8 Jac. Scaccario, SIR HUGH BROWN'S CASE**, adjudged.]

Lane, 81, 86. 89. S. C. adjudged, but by Tanfield Ch. B. in some cases a day should be given by the judge of *nisi prius*, but that shall not be a new day, but,

only the day within contained, and that only in special cases, viz. if the issue be joined, and at the showing the evidence there is a demurrer, in this case the judge gives to the party the day within contained, as it appears 10 H. 8. Rot. 835. and Hill. 11 H. 8. accordingly, in C. B. but Hill. 36 Eliz. Rot. 448. upon non suit at the assizes no day given; so if the party confess the action; and so if there be a bill of exceptions, no day shall be given, cites Hill. 38 Eliz. Rot. 331. in B. R. But perhaps it will be said, that these authorities do not match with the principal case, because it is upon a material plea, yet he said it is all one, and therefore in case of a release pleaded after the last continuance, this is recorded, and yet no day is given, as appears Trin. 20 H. 8. Rot. 906. in C. B. and this was upon a new and collateral matter, as the principal case is, and cited Trin. 20 H. 8. Rot. 247. or 2447. upon an arbitrement pleaded, and divers other precedents upon the same point.

[5, If a man recovers upon demurrer, or by default, &c. and a writ of inquiry of damages is awarded, there ought to be continuances all times between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not complete till the second judgment upon the return of the writ of inquiry of damages. Trin. 14 Jac. B. R. between **PIPE** AND **AGAR**, by the clerks. Tr. 23 Car. B. R. between **JENNINGS** AND **SANDERS** adjudged per Curiam upon demurrer.]

Roll. Rep. 508. pl. 46. Pipe v. Agar, S. C. Coke Ch. J. said that, as he remembered, it had been resolved, that there was no

need of any continuance, but Doderidge said, that the plea is at an end by the first judgment, but the clerks said, that they always used to make continuances after the first judgment, but some of the clerks said, that after the writ of inquiry is served, it is not usual to make any continuance. — 3 Bullst. 208, 209. S. C. Coke Ch. J. said, that it is good either way; and all the clerks of the court being demanded, answered, that there was no necessity to enter a continuance after the writ of inquiry awarded; and judgment affirmed accordingly.

[6. But he needs not in this case to make any continuance after the second judgment. Tr. 14 Jac. B. R.]

[7. If a judgment be given upon *nil dicit*, a writ of inquiry of damages may issue the same term, in which the judgment is given without any continuance, but not in another term. M. 10 Jac. B. per Curiam, and said to be adjudged, and that the precedents are so. This is the course de B. R. but in Banco it is otherwise, for there the use is, that if a writ of inquiry be awarded returnable the next term, no *idem dies* is given to the plaintiff; but otherwise it is in Banco Regis. Pasch. 16 Car. B. R. between **LEMAN** AND **MARPOWDER**, per Curiam adjudged in a writ of error, upon hearing the prothonotaries de Banco. Intratur Tr. 15 Car.]

Fol. 486. Godb. 195. pl. 280. Trin 10 Jac. C. B. Wetherell v. Green, S. P. by the Prothonotaries, and seems to be S. C. and the Court

said, that if it was not the course of the Court, they would not allow of it, but they would not alter the Court. The words of the continuance were, quia viccomes non mihi breve.

Continuance and Discontinuance.

[8. In an action of debt in an inferior court, if the defendant acknowledges the action at one court, and no judgment is entered at this court, but at the next court judgment is given for the plaintiff, if there be no continuance between the said courts, this is a discontinuance. P. 11 Car. B. R. between THORNTON AND WAPE, per Curiam adjudged, and a judgment given in York reversed accordingly. Intratur M. 11 Car. Rot. 318.]

In writ of inquiry of damages on a judgment by default, no day ought to be given

[9. If a judgment be given in trespass, or other such action by default, or upon demurrer, and a writ of inquiry of damages awarded returnable the next term, no continuance per idem dies shall be given to the defendant, because he is out of court by his own default. This is the constant course de Banco Regis.]

to the defendant, because he is out of court, & fine die. Sid. 16. pl. 8. Mich. 12 Car. B. R. Burgess v. Pierce.—And so Twissden said it was adjudged, 5 Jac. Ibid.—And Ibid. says, that according to this is the case of recovery in writ by default, where upon the writ of inquiry the defendant had no day in court, and cites 17 E. 3. 58. b. pl. 50.

Co. J. 445. 446. pl. 24. Mich. 15 Jac. B. R. but entered 20 Jac.

[10. If the defendant in an action imparl till octabis Michaelis, at which day the term is adjourned to mense Michaelis, to which day there is no continuance, but to octabis Hilarii after there is a continuance, this is a discontinuance. H. 10 Jac. B. R. per Curiam, between HUNSLEY AND OSBAN.]

ANON. S. P. and seems to be S. C.—Where the defendant has day by imparlance to octabis Michaelis, and nothing is done till octabis Martini, the plea shall not be hereby discontinued any time in the same term; per Frowike. Keilw. 56. b. 57. a. pl. 6. Mich. 20 H. 7.

11. If tenants in prapice quod reddat vouchers M. who vouchers over N. who comes by process, and day is given upon effoign between the demandant, the tenant, and M., &c. without mentioning of N. this is discontinuance of process against N. though he never entered into the warranty. Br. Discontinuance de Process, pl. 39. cites 8 E. 3. 7. Fitzh. Voucher, 155.

12. Prapice quod reddat, at the petit cape the demandant prayed seisin of the land, and the tenant alleged discontinuance of process, in as much as in the original the tenant is named J. S. of C. and in the writ of view C. is left out, by which the demandant counted against the tenant, for the fault appeared in the record; quod nota, the default saved seisin of the land. Br. Discontinuance de process, pl. 49. cites 38 E. 3. 22.

Br. Effoign, pl. 137. cites S. C.

13. Cofinage the parties are at issue, and the tenant is by attorney, and the tenant himself is effoigned after the issue, there this is discontinued; for the attorney ought to have been effoigned. Br. Discontinuance de Process, pl. 5. cites 40 E. 3. 34.

[466] Br. Effoign, pl. 27. cites S. C.

14. In debt it was agreed, that if he who has made attorney be effoigned, and his attorney not removed, it is discontinuance of the process; for the attorney ought to have been effoigned. Br. Discontinuance de Process, pl. 6. cites 45 E. 3. 10.

15. If the plaintiff in debt casts effoign where he has attorney in court, and the effoign is adjudged and adjourned, there the process is discontinued. Br. Discontinuance de Process, pl. 56. cites 45 E. 3. 10.

16. By

16. By the *casting of a protection* the day is discontinued, and after the year and day, upon resummons or reattachment, the plea shall be recontinued; but the plea may be revived by resummons within the year upon the repeal of the protection. Jenk. 26, 27. in pl. 50. cites 3 H. 4. 10.

17. A man had two attorneyes in formedon, and the one was *essoigned after appearance*, and the other not, and the *essoign was adjudged and adjourned*, and after this matter was alleged for discontinuance; because the one was not *essoigned*, and by the best opinion it is no discontinuance, and especially because the exception was taken before the *essoign* was adjudged and adjourned; but *quære*, for *adjornatur*. Br. Discontinuance de Process, pl. 10. cites 11 H. 4. 53.

Br. *Essoin*,
pl. 38. cites
S. C.

18. *Avowry* by one in *replevin* against three, and so to issue, and the other two said that they came in aid of the avowant; now if the two have not day and continuance by the roll from day to day all is discontinued; nota. Br. Discontinuance de Process, pl. 22. cites 21 H. 6. 23.

In action
against two,
if day be
given on the
process in
the roll
against one

only, this is a discontinuance; and the same in trespass against six, and the *mesne process* is continued against five only; but it may be amended, because it is the misprison of the clerk; but otherwise if no day was given to either of them. Br. Discontinuance de Process, pl. 38. cites 21 E. 4. 3.

19. *Certiorari* came into *Middlesex* to remove appeals and indictments, and an appeal was remanded into *Middlesex* because the defendant ought to have pleaded not guilty and challenged twenty, by which the jury remained for default of jurors and twenty-four tales awarded, and this because the process shall not be discontinued, for nothing is recorded in Bank but the original; quod nota. Br. Discontinuance de Process, pl. 52. cites 16 E. 4. 5.

20. At the *venire facias* returned, the defendant is *essoigned and adjourned*, the *habeas corpore juratorum* shall have the same day as the *essoign* has by adjournment; for otherwise it shall be discontinuance of process against the jury. Br. Discontinuance de Process, pl. 53. cites 21 E. 4. 20.

21. In writ of error it was in a manner agreed, that where the parties are at issue and intratur, quod jurata inter illos ponitur in respectu hic usque tali die, &c. which it is not used to give, Et idem dies datus est partibus predictis, &c. and yet no discontinuance. Br. Discontinuance de Process, pl. 41. cites 2 R. 3. 9.

22. In *assise* the tenant appeared by bailiff, and day is given to the party aforesaid, and not to the bailiff by name, he may plead divers pleas, &c. and yet well by all the justices except Brian; and judgment given accordingly; for the tenant is always party, and may appear by another bailiff after, or by attorney or in person and plead. Br. Discontinuance de Process, pl. 34. cites 6 H. 7. 15.

23. In writ of error, if the errors are not assigned, and *scire facias* thereof sued the same term, this is discontinuance. Br. Discontinuance de Process, pl. 44. cites F. N. B.

S. F. Ibid.
pl. 59. cites
F. N. B.

24. No discontinuance shall be by the death of a stranger to the original as of the prayee in aid, voucher, &c. viz. death of a stranger

Continuance and Discontinuance:

to the writ between divisions of the writ. Br. Discontinuance de Proceſs, pl. 60.

25. In *affiſe* the defendant appeared by bailiff, and pleaded, and continuance is taken, *dies datus eſt partibus predictis*, &c. & non balivo, and well, and no diſcontinuance. Br. Discontinuance de Proceſs, pl. 63.

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Jenk. 59.
in pl. 9.
S. P.

26. In a *quare imp'* againſt two at the pone, the ſheriff returns *nihil* as to one of them, and ſays nothing of the other, this is a diſcontinuance of proceſs. Jenk. 57. in pl. 5.

S. P. as to
the courſe of
C. B. held
accordingly,
and the er-
ror aſſigned
over-ruled.
Cro. E. 75.

27. Error of a judgment in *ejectment* was aſſigned, that *no day was given* to the parties in a writ of inquiry of damages, ſed non allocatur; for the defendant is not to have day, and the plaintiff is to attend at his peril; and ſo is the courſe in C. B. but it is otherwiſe in B. R. Cro. E. 144. pl. 2. Mich. 31 & 32 Eliz. B. R. Matthew v. Haſſal.

pl. 33. Mich. 29 and 20 Eliz. B. R. in caſe of Preſton v. Tooley. — S. C. cited Roll. Rep. 31. by Coke Ch. J. that judgment was affirmed. And the ſame difference between the courts of B. R. and C. B. was agreed by all the clerks in the principal caſe there. Trin. 12 Jac. B. R. Cobbe v. Heydon. — S. C. cited accordingly. 11 Rep. 6. b. in Sir John Heydon's caſe, which was an action of treſpaſs againſt A. B. and C. — A. confeſſed judgment, and B. and C. ſeverally pleaded not guilty, and ſeveral venires were awarded to try theſe iſſues, &c. but no day was given to A.

28. Proceſs was ſerved by a ſerjeant at mace within a franchise; but becauſe he was not an officer to B. R. he cannot be examined, and conſequently there is a diſcontinuance of proceſs. Arg. Palm. 103. cites 41 Eliz. Willet v. Croſby.

29. After judgment in a Court of Piepowders in an action on the caſe for words, it was aſſigned for error, that a writ of inquiry of damages was awarded, and no day given to the plaintiff; and this was held to be error. Cro. E. 773. pl. 2. Mich. 42 & 43 Eliz. B. R. Howel v. Johns.

Noy, 120.
Harring-
ton's caſe.
S. C. and
judgment
reverted.

30. Judgment in trover in Shrewſbury court by default, and a writ of inquiry of damages was returnable the next court, at which day the plaintiff appeared, and the writ was returned ſerved; but *jurata ponitur in reſpectu uſque ad proximam curiam*, and the day expreſſed certainly; and then the plaintiff appeared again, and the *jurata ponitur in reſpectu* to the 10th of June, but the plaintiff did not appear on that day, nor had any day over, and yet *jurata ponitur in reſpectu* again, to ſuch a day, at which day the jury appeared, and gave 20 l. damages, for which the plaintiff had judgment, and likewise for his coſts. It was aſſigned for error, that the plaintiff not having day at the laſt adjournment over, all is diſcontinued; for by the firſt judgment the defendant is out of court, but the plaintiff attends de die in diem, his judgment not being perfect till the damages are inquired; ſo that the plaintiff having day to the 10th of June, and he then not appearing, the Court ex officio ought not without prayer of the plaintiff to make continuance of the jury, for this always ought to be at the prayer of the plaintiff; quod fuit conceſſum. Yelv. 97. Hill. 4 Jac. B. R. Harrington v. Lauſdon.

31. Another diſcontinuance was aſſigned, becauſe the jury was continued over by a *ponitur in reſpectu*, which never ſhall be unleſs upon

upon an issue to be tried between the parties; for the jury upon a writ of inquiry of damages, is only an inquest of office, which has no other continuance than by a non misit breve by the officer or the sheriff; quod fuit concessum per tot Cur. and judgment reversed. Ibid.

32. *Want of an original* was assigned for error in Ireland; the defendant in error pleaded that such a day an original was filed and concluded to the country, and thereupon the judgment was reversed. But this judgment there was reversed here because the matter was discontinued; for the defendant concluding to the country where the matter of his plea should be tried by the record, viz. whether the original writ was delivered or not (because that appears of record) and then the plaintiff in error not replying or demurring upon the plea of the defendant, the whole was discontinued. Yelv. 117. Mich. 5 Jac. B. R. Seintjohn v. Commyn.

33. A discontinuance can never be objected pendente placito before judgment, for it may be continued at the pleasure of the court; but after judgment in another term it may be well rejected, and no continuance can then be entered; sic dictum fuit. Cro. J. 211. in pl. 3. Mich. 6 Jac. B. R.

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34. *Three executors recovered* in C. B. in debt by default. The defendant brought error, and assigned a discontinuance, viz. that the suit being by three executors, and at the day, which they had by the roll upon a continuance, two only appeared; and by the same roll, day was given to all three upon another roll. Per tot. Cur. this is a discontinuance, and cannot be amended; for credit ought to be given to the roll, and therefore non constat that more than two appeared, and that the third made default, which is a non-prosecution of the defendant at that day, and shall go to all three afterwards, and judgment was reversed. Yelv. 155. Trin. 7 Jac. B. R. Paston v. Lusher.

35. Error of a judgment in B. R. in debt. A scire facias was awarded ad audiendum errores returnable 11 Maii, 18 Jac. and there was not any such day of adjournment in the Exchequer-chamber; therefore it was holden to be a discontinuance. Cro. J. 620. pl. 6. Mich. 19 Jac. B. R. Cave v. Polewheel.

36. When an issue is found against the defendant, it is not material whether he has day given him to appear or not; for he demands nothing but to discharge himself, though true it is that sometimes day has been given, but it is not necessary; but the plaintiff ought always to appear, and to have day by the record. Palm. 333. Hill. 20 Jac. B. R. Rogers v. Allen.

37. After judgment by default in action on the case, writ of inquiry of damages was awarded. Error was assigned for that no day was given to the defendant; but adjudged that no day ought to be given to the defendant in such case, because by the judgment he was out of court, & sine die. Sid. 16. pl. 8. Mich. 12 Car. 2. B. R. Burges v. Pierce.

Ibid. says, that according to this is the case of the recovery in waste by default, where, upon the writ of

inquiry, the defendant had not any day in court. 17 E. 3. 58.

38. It

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38. It was assigned for error of a judgment in P. that *one day of continuance between the plaint and the issue was on a Sunday*, and so non dies juridicus; sed non allocatur; for per Cur. it is void, and as no continuance, and so being after a verdict is aided, and judgment affirmed nisi. 2 Keb. 448. pl. 15. Hill. 20 & 21 Car. 2. B. R. Hele v. Davis.

So where the continuance was ad proximam curiam, viz. 16 die,

whereas the court was not held till the 26th day; Roll Ch. J. said, that perhaps the viz. may be void, yet judgment was reversed. Sty. 97. Pasch. 24 Car. B. R. Pay v. Parted.

39. Error to reverse a judgment was assigned, that one of the continuances was *to a certain day of the month*, whereas it ought to be ad proximam curiam; and judgment was reversed nisi. Sty. 70, 71. Mich. 23 Car. B. R. Knipe v. Johnson.

40. A *fci. fa.* issued against several tertenants; but the *parol demurred* for the infancy of one. After his age a *re-summons* issued, but before the return thereof *one of the tertenants died*, who was returned summoned both upon the *fci. fa.* and upon the *re-summons*. By this all the proceedings on the *fcl. fa.* are discontinued, and the parties out of court, and the death of one tertenant puts the whole without day; and Holt Ch. J. cited Kelw. 69. & Fitzh. Abr. tit. Error, 7. Carth. 200, 201. Mich. 3 W. & M. in B. R. Blake & al' v. Gell.

41. *Appeal de morte viri* carried down to be tried by nisi prius; *appellant did not put in the record*; held neither nonsuit nor discontinuance, but appellant to pay costs. 12 Mod. 65. Mich. 6 W. & M. Sutton v. Sparrow.

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42. In debt on a by-law in the Mayor's Court for refusing to serve as sheriff, the *plaint was levied on the 15th November*, and then the defendant gave bail to appear the next day, viz. the 16th, and instead of continuing from the 15th to the 16th, *day is given from the said 15th day of November to a certain day in June*, and then the entry is, *that the cause was removed by hab. corp. to C. B. and sent down by procedendo*. This was held to be a discontinuance, and not amendable, being upon a demurrer. 12 Mod. 669 to 690. Hill. 13 W. 3. City of London v. Wood.

43. *Capias of process* must have continuance, and therefore must be from term to term; but *writs of execution* need none, and therefore you may have a longer return. Per Cur. 12 Mod. 506. Pasch. 13 W. 3. Walker v. Humphry.

44. In an *information for a libel* called the *Observator*, the *venire facias* was tested in Trin. term, returnable *Die Lune the 1st day of Mich. term following*; but the *distringas bore teste Die Martis the day following* (id est) the 24th of Nov. whereas it ought to have been the day of the return of the *venire facias*; and this was held to be a discontinuance and not amendable. Mich. 3 Ann. B. R. The Queen v. Tutchin.

45. *Appeal of murder* against B. he demurs to the bill of appeal and pleads over to the felony, upon which issue is joined and a *venire facias* is awarded with a *cesset processus* until the demurrer be determined. It was objected that here was a discontinuance of the issue, the entry being *quod ad triandum exitum prædictum cesset processus*,

processus, &c. whereas the venire should have been continued with a vicecomes non misit breve. The Court held this no discontinuance, but that it was the most proper way; for it is vain to proceed to issue until the demurrer be determined; for if the bill abates there is an end. 11 Mod. 232, 233. Trin. 8 Ann. B. R. Smith v. Bowen.

(B. 2) What a Discontinuance, and what a Miscontinuance.

1. *SECOND deliverance* was brought against an abbot and *commoigne*, the plaintiff did not come, they prayed return irrepleviable; and the Court saw the original, which was abbot and canon, by which the Court said that he shall commence again to this variance, and so see that this is miscontinuance. Br. Discontinuance de Process, pl. 17. cites 21 E. 3. 49.

2. If *capias* be awarded where distress ought to be awarded, and the defendant is taken and amesned, he shall go quit, and the process shall issue where it first issued out of course, and distress shall issue; for it is miscontinuance and not discontinuance. Br. Discontinuance de Process, pl. 57. cites 47 E. 3. 14.

3. Debt against 3 executors, process continued till the pluries *capias* served, and they made default, the plaintiff sued exigent against 2, and pluries *capias* against the 2d. and the one rendered himself at the exigent, and the others did not come. Per Hull, sue new exigent against them all, and make amendment where the process first issued out of court. Per Hank, he shall answer, for he, who comes in by one writ where he ought to come by another, shall answer. Br. Discontinuance de Process, pl. 11. cites 12 H. 4. 17.

4. And per Parning T. 10 E. 3. where *petit cape* issued for grand *cape*, the process is not discontinued; and so it seems only miscontinuance because they have day in court, and therefore the executor shall answer as it seems. Ibid.

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5. *Præcipe quod reddat* of 120 acres of land, the writ of view was of 100 acres of land omitting 20, and therefore by award he sued new writ of view; for the process is not discontinued, but miscontinued. Br. Discontinuance de Process, pl. 18. cites 7 H. 6. 8.

6. Detinue of charters, process issued at the exigent, which was alleged for discontinuance of process; for exigent lies not in this action, and it was adjudged miscontinuance, and not discontinuance, by which they commenced where the process first issued out of course. Quod nota. Br. Discontinuance de Process, pl. 50. cites 8 H. 6. 29.

7. Detinue of a box with charters and muniments, defendant came by the exigent, and the plaintiff counted in special of a charter, by which J. infeoffed his father, &c. and now because it is of a charter of land, therefore exigent ought not to have issued, but this did not appear before the count, by which it was taken mis-

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tinued but not discontinued, and the defendant appeared, and pleaded as if he had not come by exigent, by which he pleaded in bar. Br. Exigent, pl. 26. cites 8 H. 6. 29.

8. Note, that if exigent be awarded in a case where it does not lie, as in action upon the case before the statute of it, the process is illy continued, but is no discontinuance. Br. Discontinuance de Process, pl. 61. cites 10 H. 7. 21.

9. In trespass, the defendant joined 2 issues, the one in L. and the other in Middlesex, and venire facias issued to the sheriff of Middlesex who tried both; and by the best opinion, this was miscontinuance of the other issue in L. and not discontinuance; for it shall be intended that several venire facias's issued to try both. Br. Discontinuance de Process, pl. 62. cites 11 H. 7. 5.

10. In præcipe quod reddat against baron and feme, the baron made default, and the feme prayed to be and was received and pleaded in bar, and it was found with the demandant and he prayed his judgment. Per Wood J. this is a miscontinuance, but per Vavisor J. it is a discontinuance. Kelw. 35. a. b. &c. pl. 2. Trin. 13 H. 7.

So where it comes by one process where it ought to come by another. Ibid.

11. Præcipe quod reddat, the venire facias was returned before the common day. Per Frowick Ch. J. this is no discontinuance of process, but miscontinuance of it; for they have day in court but not such a day as they ought to have. Br. Discontinuance de Process, pl. 23. cites 21 H. 7. 16.

But if process be awarded termino Trinit. returnable termino Hillarii, this is discontinuance of process, because one term misne is omitted; therefore this is discontinuance, per him. But Brooke says, quare inde; for the plaintiff may delay himself. Ibid. And if exigent be returnable at a month, this is miscontinuance, and not discontinuance, but he ought to have 5 months, and allocacio comitatus shall be granted. Quare, for it seems that the one and the other is error. * Bulst. 144. Arg. cites S. C.

* S. P. Ibid. pl. 47. cites 34 H. 6. 20. Br. N. C. 176. pl. 529. cites S. C.

12. There is a diversity between discontinuance and parol without day, for the discontinuance * puts the party to new original, but where the parcel is without day this may be revived by a resummons or re-attachment; for the original remains. Br. Discontinuance de Process, pl. 43.

Jenk. 59. in pl. 11. S. P.

13. A miscontinuance is where the continuance is made by undue process; but a discontinuance is where no continuance is made at all. Jenk. 57. at the end of pl. 5.

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(C) Continuance per Idem Dies.

[1.] IN an action of debt in a borough court, if process issues to the serjeant, who returns his precept served against the defendant, and thereupon a day is given till the next court for the plaintiff to declare against the defendant, and it is not entered, that idem dies datus est defendenti, this is a discontinuance. P. 3 Car. between CALMADY AND VAUGHAN adjudged in a writ of error, and the judgment given for the plaintiff upon nil dicit in the borough court of Oakchampton in Devon. reversed accordingly.]

[2. If

[2. If a *plaint* be entered in an inferior court that holds plea by prescription, and there the defendant *imparls*, and thereupon a day is given to the parties till the next court there to be held, without limiting any day when the court shall be held, but it is alleged after in the record, at which court, *scilicet*, such a day, held *secundum consuetudinem*, &c. this is good, and no discontinuance, because it may be, that they have not any certain day, but may hold a court when they will, as at the great sessions in Wales; and it shall be so intended, when it is said, that at the next court held *secundum consuetudinem*, &c. Mich. 7 Car. B. R. between JESSON AND LAXE, per Curiam adjudged upon a writ of error upon a judgment given in Coventry Court, and the book of 9 Eliz. D. 252. denied, and said that there were other apparent errors for which the judgment was reversed.]

• Cro. C. 254, 255. pl. 6. S. C. adjudged, three justices, dubitante Crook J. but no mention is there of the court being held such a day, *secundum consuetudinem*.—S. C. cited by Twiss & J. Raym. 205.

[3. [But] if a *plaint* be entered in an inferior court, and the defendant being summoned appears, and the plaintiff declares, and thereupon the defendant *imparls* till the next court, and then pleads in bar, and thereupon the plaintiff *imparls* to the next court to reply, and there no day is given to the defendant, but at the next court the plaintiff demurs, this is a discontinuance, for *idem dies* ought to have been given to the defendant. Mich. 8 Car. B. R. between AUGWIN AND LORD ROBERTS adjudged in a writ of error, and the judgment given in the hundred court of Penwith in Cornwall reversed. Intratur Mich. 7 Car. Rot. 96.]

[4. In a *scire facias* upon a recognizance of the peace against J. S. who was bound by it to keep the peace, the defendant *imparls* and day is given to him, and *idem dies* † is not given to the plaintiff, yet this is not any discontinuance, because the king is party in it; and when the king is party no day is given to him, for he is always present in court. M. 10 Car. B. R. between THE KING AND GRIFFITH, per Curiam.]

† Fol. 487.

5. In debt, the plaintiff and defendant both appeared by their attorneys, and day was given to both the parties in *statu quo nunc*, *salvis partibus*, &c. till 8 Hill. at which time the defendant made default. Held that the plaintiff should not have judgment, but he must sue out further process; because *dies datus* is as strong as an impariance. Mo. 79. pl. 209. Mich. 8 & 9 Eliz. Stukely v. Thynn.

6. In a court of Piepowders the adjournment was entered *idem dies* datus est, where it should be *eadem hora*, and yet held good. Mo. 459. pl. 637. Mich. 38 & 39 Eliz. Anon.

7. In error to reverse a common recovery, plaintiff brought a *sci. fa.* against the heir and the *ter-tenants*. The heir appeared, but *nihil dicit*, and four *ter-tenants* being returned warned, pleaded, that two of them were tenants of such land with A. and B. who were not warned nor † named, and demanded judgment of the writ, &c. and thereupon the plaintiff demurred, and on pleading this plea in Mich. term. *dies datus est partibus predictis* till Hill. term. It was moved, that this was a discontinuance of the whole; for the heir here *nihil dicit*, and so *nihil* ought to be entered against him, and not any continuance, but that the *dies* which is given *partibus predictis*,

† [472] Cro. E. 774. pl. 4. Mich. 42 & 43 Eliz. B. R. S. C. but S. P. does not appear. — Mo. 622. pl. 850. S. C. but S. P. does not appear.

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dictis, is intended only to those tenants on whose plea the demurrer was, and not to the heir, and that so all is discontinued; but it was answered, that it was *continued to the heir as well as to those who pleaded*; for it is *partibus prædictis inde*, &c. and all the Court, præter Gawdy, held the continuance well enough. Cro. E. 739, 740. pl. 13. Hill. 42 Eliz. B. R. Holland v. Dauntzey.

8. Action upon the *case* in the Court of S. The defendant was *essoined*, and *bad day by essoin*, and the plaintiff had the same day, at which day the defendant, being demanded, appeared not, but made default, & *habuit diem per default secundum consuetudinem ville prædictæ* given by the Court, (viz. such a day,) at which day both parties appeared, and judgment was given against the defendant by nihil dicit. Adjudged that no day could be given him when he was out of court, and the custom alleged of giving day cannot help it; for no custom can help that which is against common law and an apparent discontinuance, and therefore judgment was reversed. Cro. J. 357. pl. 15. Trin. 12 Jac. B. R. Peplow v. Rowley.

Jo. 330, 331. pl. 4. Lort v. the Bishop of St. David's, S. C. and the Court resolved, that no dies datus can be to any but upon their appearance.

9. After judgment in the grand sessions in Wales *in assise of darrein presentment*, error was assigned that P. one of the three defendants appeared, and cast an essoin, but that the other two made default, whereupon re-summons issued against them returnable *Die Martis* next following, and at the next day they cast an essoin, which was challenged and denied, and because there was not *idem dies* given to them two, as there was to the first when he appeared and was essoined, and that there ought to have been one essoin allowed unto them, it was insisted to be error; *sed non allocatur*; for *idem dies* shall not be given when they make default, and after once default and re-summons an essoin is not allowable, by the express words of the statute of 12 E. 2. Cro. C. 341. pl. 6. Hill. 9 Car. B. R. Cort v. Bishop of St. David's.

S. P. and therefore where three capias and exigent are

10. When day is given before the count, it is called *dies datus*; but when after the count it is called an imparlance. Hærd. 365, 366. Pasch. 16 Car. 2. in the Exchequer.

awarded, and the defendant appears upon the exigent, and has *dies datus*, and after makes default, a distringas shall issue, and upon this returned nihil, there shall issue three other capias and exigent; but otherwise it seems after imparlance. Br. Continuance and Imparlanes, pl. 1. cites 19 H. 8. 6.

11. It was moved for error of a judgment in Bristol, that *in one of the continuances* (*idem dies datus est partibus prædictis*) it is not said *per Cur.* But ruled to be well enough, it being all as one act, but it would be otherwise in the verdict. Comb. 285. Trin. 6 W. & M. in B. R. Hawksworth v. Hawksworth.

(C. 2) What Days shall be said the same Day.

1. NOTE, that every adjournment is a several day in assise, but the day of nisi prius, and the day in Bank, are all one-day, but not to all intents. Br. Jours, pl. 60. cites 47 E. 3. 1, 2.

2. Note,

2. Note; that the first day of the nisi prius, and the fourth day after, and eight days after or more, which the justices take to be advised, are but one and the same day, and when they give their judgment, this shall have relation to the first day, so that if protection shall be cast at the first day, which is expired mesne, yet this shall serve, and shall be allowed. Br. Jours, pl. 83. cites 10 H. 6. 4.

3. So of default recorded upon tenant for life, where he in reversion prays to be received after. Ibid.

4. And where a man fails of his record at the day, and the failor is recorded, and after (but before judgment) he brings the record in, this shall not serve when judgment is given; for this shall have a relation to the first day. Ibid.

5. The * day of nisi prius and the day in Bank is all one and the same day; for if protection be cast out at the nisi prius, and repealed or expired by the day in Bank, yet it shall serve the defendant; for it was good at the first day, and the first day and the other day are all one day in law. Br. Jours, pl. 11. cites 35 H. 6. 58.

* S. P. to plead any plea mesne between the day of nisi prius and the day in Bank, but not to make good a

second writ purchased and tested mesne between those days. Br. Jours, pl. 13. cites 40 E. 3. 38.

— Br. Nisi prius, pl. 5. cites S. C. — S. P. so that a release made mesne between these two days cannot be pleaded in Bank; but it seems that a release made mesne between the day of venire facias returned, and the writ of nisi prius awarded, and the day of nisi prius, may be pleaded at the day of nisi prius. Ibid. pl. 31. cites 21 H. 6. 10.

It is not one and the same day to all intents; for if a man casts protection at the day of nisi prius, which is repealed at the day in Bank, yet this shall have the default of the defendant at the day of nisi prius, and if he appears at the day in Bank it suffices. Br. Jours, pl. 32. cites 21 H. 6. 20. — S. P. Ibid. pl. 35. cites 4 H. 6. 9.

6. These words *ab octab' Sancte Trinit'* shall be intended *ab 24to die octab' Sancte Trinit'*, and so see that to this intent the first day and the fourth day, and all days mesne shall be intended one and the same day. Br. Jours, pl. 57. cites 21 E. 4. 43.

7. All the parliament is only one and the same day. Br. Jours, pl. 91.

(C. 3) How considered.

1. **I**N *debt* the defendant was condemned, and *ca' sa'* issued, and after exigent thereupon, and he came upon return of *reddidit se*, and pleaded a release of the plaintiff made after the execution, and prayed *scire facias* thereupon against the plaintiff to confess or deny the deed, and had it; quod nota, and so see that this is not day to plead, but upon the *scire facias* to confess deed, &c. Br. Jours, pl. 68. cites 22 Aff. 91.

2. Error upon an indictment of trespass, which supposes the trespass *Die Jovis proximo post diem Pentecostes*, and it was assigned for error, in as much as all the week was Pentecost; per Weston, Pentecoste dicitur a penta, quod est quinque & caste, quod est decem, quod est quinquies decem dies post Pascham, and this day is Dies Dominicus, wherefore plead over; quod nota, by which he pleaded no such vill of B. without addition, &c. Br. Jours, pl. 27. cites 7 H. 6. 39.

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3. Note where a man is *non-suited* this is referred to the day which he had in court, and not to the whole term; quod nota. Br. Jours, pl. 67. cites 9 E. 4. 24.

4. See and note that the *vigil of the feast* is not part of the feast. Br. Jours, pl. 65. cites 15 H. 7. 2.

£ 474] (C. 4) At what Time, and when the Parties shall be said to have Day in Court.

1. **I**N *præcipe quod reddat* the grand cape was returned *tarde*, and the tenant came and made defence and imparled, and after came and said that the writ was not served, and was received to it, and therefore it seems that such a day is not to appear; for if it should, then the default shall go quit, which shall not be, but ought to be saved. Br. Jours, pl. 92. cites 22 E. 3. & Fitzh. Brief, pl. 393.

Br. Reple-
giare, &c.
pl. 9. cites
S. C.

2. Where the sheriff does nothing at the alias, nor at the pluries, by which issued writ to the coroners to make replevin and to attach the sheriff to answer to the contempt and to the party, and after distress against the sheriff; and because no summons was awarded against the plaintiff to receive his beasts, therefore it is said that he has no day in court, and if he comes at the day he cannot plead; by which when the plaintiff came at the day, he was not suffered to plead, but was compelled to find pledges de prosequendo & de returno habendo si, &c. and to sue writ to the coroner to make deliverance and to attach the party, and upon the return of those writs he hath day in court, and may plead, and not before. Br. Jours, pl. 14. cites 43 E. 3. 26.

3. In replevin, at the pluries the sheriff did nothing, by which issued process of contempt to the coroners to attach the sheriff to answer to the contempt, but mentioned nothing of summoning the defendant to answer; and they returned that the sheriff is attached, and that they cannot have the view of the beasts to make replevin, by which issued distress to the sheriff and withernam de averiis def, and at the day the defendant came and prayed that the plaintiff gave deliverance of the withernam, and said that the beasts of the plaintiff are dead in pound in default of the plaintiff, & non allocatur, for he has no day in court; but the plaintiff was compelled to find surety de returno habendo si, &c. and pledges de prosequendo and writ to make deliverance of the first distress to the coroners. Br. Jours, pl. 70. cites 44 Ass. 15.

4. He who is outlawed and has charter of pardon, and the plaintiff is ready in court, shall not be bound to answer immediately, but shall have scire facias against him to say why the charter shall not be allowed; for neither the plaintiff or defendant have day in court till the scire facias be returned. Br. Jours, pl. 73. cites 46 E. 3. 15.

5. The party has no day to answer upon process of contempt till the attachment. Br. Jours, pl. 22. cites 11 H. 4. 87.

6. In

6. In *replevin*, the plaintiff prayed aid of *A. R.* who was seized in fee and leased to him for years, there the prayee may join in aid at the first day in person, and not otherwise; but he may join by his attorney at the day given by process; contra at the first day when the tenant prays. Br. Jours, pl. 58. cites 2 H. 6. 1.

S. P. and so of vouches. Br. Jours, pl. 79. cites 11 H. 4. 23.

7. *Replevin & alias & pluries*, and after process of contempt issued against the sheriff, and he answered that he had served this writ, and that no other writ came to him, and the defendant came and prayed that the plaintiff count against him, & non allocatur; for the plaintiff has no day in court now, but only the sheriff has day in court to answer to the contempt. Br. Jours, 82. cites 2 H. 7. 5.

8. At the day that the sheriff returned *mandavimus ballivo*, &c. *quod nullum dedit responsum*, and yet the defendant was permitted to appear to plead to issue. Br. Jours, pl. 87. cites Fitzh. Process, 13.

(C. 5) Day in Court. Necessary in what Cases. [475]

1. NOTE per Luddington and Fitzjohn, if a man who is debtor to the king of record be in person in the Exchequer, he shall be compelled to answer without process or day in court. Br. Jours, pl. 90. cites 40 Aff. 35.

2. Contra per Fitzjohn, if it be upon surmise, and is not debtor of record. Ibid.

3. In debt the plaintiff recovered, and he was not suffered to come after, and confess his gree or satisfaction; for he has no day in court. Contra upon recognizance, for this commences without original; but writ of debt has day in court, and therefore shall have *scire facias*. Br. Jours, pl. 77. cites 47 E. 3. 24.

4. In writ of error the plaintiff cannot be nonsuited, for he has no day in court upon it, but upon the *scire facias*; and e contra in writ of false judgment. Br. Jours, pl. 80. cites 20 H. 6. 18.

5. A man who is outlawed cannot come gratis without day in court, and plead a plea in the discharge of the outlawry. Br. Jours, pl. 80. cites 22 H. 6. 23.

6. Debt by the king, which passed for him by *nisi prius*, and before the day in Bank the king pardoned him all debts, trespasses, &c. and after the king at the day in Bank had judgment, and after sued execution, and the defendant pleaded a release, and the king was barred; for the defendant had no day to plead it before, for the day of the *nisi prius* and the day in Bank are all one, and the defendant cannot have *audita querela*, nor *scire facias ad cognoscend factum* against the king, and he shall have the plea without day in court when the execution sued, and therefore it seems that it was sued by *fieri facias* or *ca. sa*. Br. Jours, pl. 61. cites 34 H. 6. 3. 50.

7. *Homine replegiendo* at the pluries, and after process issued against the sheriff to answer to the contempt, and no day given to the defendant, and the sheriff returned *quod corpus elongatur*, and yet the defendant appeared and pleaded, and good per Cur; for if he should not be now received, his body should be imprisoned by *withernam*, Br. Jours, pl. 81. cites 7 E. 4. 5.

M m 4

8. Appeal

Br. Jours,
pl. 37. cites
8, C.

8. *Appeal at the suit of the feme, the defendant was outlawed and taken, and it was demanded what he had to say why he should not be hanged, and he said that where he is named J. S. his name is J. F. and the feme prayed execution, and it was doubted whether she may reply that he is the same person who killed, &c. without being warned by scire facias to have day in court, and by the best opinion scire facias shall issue.* Br. Scire Facias, pl. 132. cites 9 E. 4. 24.

9. For where a man is condemned in damages, the plaintiff said that he is in the hall, and prayed an officer to take him, and the Court granted it, and he is taken and confesses, he shall remain in execution; but if he says that he is not the same person, the plaintiff cannot reply that he is; for he has no day in court, and there he shall be put to process to have execution, but here there is no such process to be awarded. Ibid.

[476] (C. 6) Day in Court. What Day shall be given, common Day or other Day.

1. *Procipe quod reddat, consuance of the plea was demanded by J. N. and had it, and day given in franchise, and after those of the franchise erred, by which writ of error was brought, and the judgment reversed in B. R. and the Court was ready to have awarded seisin of the land, by which came M. and prayed to be received, and shewed cause, and was received and vouched, and the demand counterpleaded, and they were at issue, and common day was given as in plea of land, and no such day as shall be given in writ of error; for he is out of this court; quod nota.* Br. Jours, pl. 26. cites 21 E. 3. 4. 6.

2. *In scire facias the Court may give what day they will; for this is in nature of an execution; quod nota.* Br. Jours, pl. 66. cites 24 E. 3. 31.

3. *Affise returnable in B. R. in oct. Martini, the plaintiff prayed day the next day, and because it was returnable at a day of the term, and not at a certain day of the week, he can have only common day of the term, viz. oct. Hill.* Br. Jours, pl. 45. cites 27 Aff. 33.

4. *Per que servitia, the defendant was at issue, and prayed common day, and could not have it, because it is a writ of execution; quod nota bene.* Br. Jours, pl. 38. cites 39 E. 3. 20.

5. *In trespass, if the king grants to J. N. consuance of pleas within his manor, there the tenant shall not have day, but de tribus septimanis in tres septimanas; per Rolf. Contra per Marten; for the king may alter the place of justice, but not the day. But Brooke says, quære of the day, for the law is with Rolf as it seems.* Br. Jours, pl. 30. cites 8 H. 6. 20.

6. *In farmodon the parties demurred in judgment, and day was given 15 Trin. anno 8. and after from this in 15 Michaelis, and from thence in oct. Hill, and from thence in 15 Pasche, which are not common days in plea of land; and per tot. Cur. it shall not be amended; for after demurrer they may give day beyond the*

the common day, and may give day within the common day, for they may give longer day or a very short day, for this lies in their discretion, and the entry is *quod iustic. nondum avisantur*, &c. for these are days of grace and not common days. Br. Jours, pl. 52. cites 8 E. 4. 4.

7. *So of imparlance.* Ibid.

8. And the statute of common days in Bank is intended only where they pend in process, and it is agreed that this is a statute. Ibid.

9. If in *præcipe quod reddat* the sheriff returns *quod petens non invenit plegios de prosequendo*, &c. the *sicut alias* shall not have common day, but 15 days suffices, for this is as original, for he was not demandable at the first day. Per Danby. Br. Jours, pl. 36. cites 6 E. 4. 18.

10. Per Brian, if *grand cape or venire facias* be returned *tarde*, the 2d writ shall have common day. Br. Jours, pl. 36. cites 9 E. 4. 18.

11. But they agreed with Danby in case that the original shall be returned *tarde*. Ibid.

12. And by all the clerks *scire facias* shall have such day as writ of dower, in favour of execution. Ibid.

13. In *assise of mortdancestor* common day may be given, viz. oct. Michaelis 15, &c. But in *assise of novel disseisin*, day certain shall be given, as *Die Lune tali septimana*, &c. or *Die Martis 11 Die Aprilis*, &c. apud Westm. &c. Br. Jours, pl. 75. cites F. N. B. fo. 177.

(C. 7) What shall be Day in Court, sufficient by [477] the Roll.

1. *IN præcipe quod reddat* the tenant vouched, and at the day of the summons *ad warrantizandum* returned, the sheriff returned no writ, and yet the vouchee was received to plead; quod nota; and the tenant said that he is another person, and not the vouchee. Br. Jours, pl. 88. cites 5 E. 3. and Fitzh. Voucher, 197. but cites Ibid. 256. contra.

2. In *replevin*, the plaintiff after issue was nonsuited, and return awarded, and the plaintiff sued second deliverance; and at the pone per vadios, the writ was not served, and the defendant prayed that the plaintiff might count against him, because he had day in court by roll though he had not day by writ, and if the plaintiff had deliverance he would not count against the defendant. And per Wilby, you cannot sue to the sheriff to have the writ returned if the plaintiff will not, and if the sheriff has made deliverance and not returned the writ, you shall have remedy against the sheriff, by which he was put to sue *sicut alias*, &c. Br. Averment, contra, &c. pl. 10. cites 21 E. 3. 43.

3. In *trespass*, at the exigent the defendant appeared and the plaintiff not, nor did the sheriff return the writ, yet the plaintiff shall be demanded to be nonsuited at the day; for he has day in court by the

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the roll, though the writ be not returned. Br. Jours, pl. 64. cites 38 E. 3. 20.

4. And the same year fol. 25. in *quare impedit* at the attachment the defendant and plaintiff appeared, and the sheriff did not return the writ, and yet by Thorp, clearly, the defendant may plead; for he has day by roll; quod nota. And concordat 21 E. 3. fol. 13. where the sheriff returned no writ. Ibid.

5. Contra if he returns nihil; nevertheless it seems if nihil be returned at such day that the defendant is to be at a loss, he shall be received. Ibid.

6. Audita querela upon a release made after judgment in trespass, and venire facias issued against him who released, and the sheriff did not return the writ, and the defendant prayed that the plaintiff be demanded, & non allocatur, because the writ is not returned served, notwithstanding that he has day in court. Br. Jours, pl. 51. cites 6 E. 4. 9.

7. Contra where a man is to have corporal punishment, as in capias or exigent, there it may appear by the roll where the writ is not returned; contra upon pone; quod nota. Per tot. Cur. Ibid.

8. Where no writ is returned, and the jury appears, they shall be taken, per Huffle Ch. J. for they have day by the roll, which Townsend agreed; contra per Brian, Fairfax and Sulyard. Br. Jours, pl. 47. cites 3 H. 7. 16.

S. P. Br. Saver De-fault, pl. 1. cites 27 H. 6. 13. but it should be H. 8. according to Br. Jours, pl. 1.

9. Note, per Fitzherbert and Shelly J. quod non negatur, that where the grand cape in *præcipe* quod reddat is not returned, yet at this day the tenant may appear and gage his law of non summons, for he has day by the roll; quod nota. Br. Jours, pl. 1. cites 27 H. 8. 14.

10. In case on an *indebitatus assumpsit* the plaintiff made an *ill replication*, and therefore Roll Ch. J. said, that judgment ought to be given against him; but that by favour of the Court they can give him leave to discontinue his action. Sty. 309. Mich. 1651. Kymlock v. Bamfield.

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In Roll it is (Court) but by the plea it should be (defendant).

(D) Discontinuance of Process.

In what Cases it cannot be without the Assent of the Court. [Defendant.]

S. P. by the justices, that a discontinuance cannot be after a verdict. Het. 3. Pasch.

[1.] IN an action after issue joined, and a verdict found for the plaintiff, the plaintiff cannot discontinue the action without the consent of the defendant; and if he will not enter the judgment, the defendant himself may enter it. Mich. 17 Car. and Hill. 17 Car. Banco, between THORP AND DAVENANT, in an action upon the case upon a promise, adjudged for the plaintiff upon the request of the defendant, though the plaintiff would have discontinued

discontinued the suit, and have brought a new action to have had more damages.] 3 Car. C.B. Anon.—

S. P. by Roll Ch. J. Sty. 346. Mich. 1652. — S. P. per Cur. Lev. 48. Mich. 13 Car. 2. B. R. Anon. — Sid. 60. in case of Ellis v. Yarrow, S. P. and seems to be S. C. — Mod. 13. Mich. 21 Car. 2. B. R. in case of Abbot v. Moore, S. P. — Sid. 228. Mich. 16 Car. 2. B. R. in case of Bull v. Mayo, that discontinuance cannot be by rule of court after verdict, but by consent it may. — In such case the defendant may enter judgment against himself; per Doderidge J. Sty. 216, Mich. 3 Car. Stokeland's case.

But after a *special verdict*, and argued at the bar, a discontinuance was entered by the plaintiff as it was agreed he might. Cro.C. 575. pl. 19. Hill. 15 Car. B. R. Oxford (Ld.) v. Waterhouse. — S. C. cited Arg. Show. 63.

2. The plaintiff after a demurrer cannot discontinue his suit without the Court's licence; and although the continuance be not entered, it may be entered at any time, and the defendant by licence of the Court, for his own advantage, may enter the continuance; per tot. Cur. Cro. J. 316, 317. pl. 2. Mich. 10 Jac. B. R. in case of Fox v. Jukes.

Bult. 217. Fox v. Jux, S. C. says, it was a rule made by the Court, that the plaintiff cannot discontinue for

to save his payment of costs thereby after a demurrer, when the cause is then by the demurrer in the judgment of the Court, and in their discretion either to confirm or discontinue the same, and it is not then in the power of the plaintiff to discontinue without assent of the parties, and this assent he ought to make appear to the Court. — After a demurrer on an *arbitration bond*, it is not usual to discontinue the action; per Cur. but ordered a *nil capiat* to be entered nisi causa. Sty. 134. Trin. 24 Car. Anon. — 3 Lev. 440. cites 26 & 27 Car. 2. B. R. that a discontinuance was permitted to be made by the plaintiff after demurrer and argument, by Ld. Ch. J. Hale, and the court of B. R. but that it is entered Mich. 26 Car. 2. B. R. Rot. 349. — Leave was given to discontinue after demurrer, Raym. 64. Hill. 14 & 15 Car. 2. B. R. Palmer v. Richards.

3. After issue the plaintiff cannot discontinue without the assent of the defendant; per Curiam. Keb. 485. pl. 23. Pasch. 15 Car. 2. B. R. Butcher v. Ersefield.

4. Debt upon a charter-party, in which were several covenants, and at the end each bound himself to the other in 1000l. for the performance of covenants. The declaration was good till plaintiff came to the assignment of the breach in which were several faults; upon a demurrer to it the plaintiff desired leave to discontinue, but it was not allowed, unless the defendant would consent, the action being debt for the penalty; and for that the plaintiff is not without his remedy; for he may bring a new action upon the covenant. 2 Lev. 117, 118. Mich. 26 Car. 2. B. R. Rea v. Barnes.

But afterwards, Hill 26 & 27 Car. 2. B. R. he had leave to discontinue upon payment of costs. 2 Lev. 124. S. C.

5. In covenant by the father of an apprentice upon the indenture of apprenticeship, there was judgment by default against the defendant (the master). Upon a writ of inquiry very small damages were given, with which the plaintiff being not satisfied, moved for leave to discontinue the action; but the Court answered, that they had no power to give such leave without the consent of the defendant, which in this case he refused. But the plaintiff's counsel insisted, that the Court had power to give leave to discontinue without the consent of the defendant, because the award of the writ of inquiry on the roll is no other than a rule of Court, and no judgment. And it is clear, that after a special verdict found for the plaintiff he may discontinue; and this was laid down for a rule, (viz.) wherever a writ is abateable by the death of the plaintiff, there he may discontinue without the assent of the defendant.

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pendant. On the other side it was said, that the award of the writ of inquiry on the roll was such a judgment that afterwards the plaintiff could not discontinue, because the defendant is out of court, and has no day in court, and therefore the suit is determined; and an action which is determined cannot be discontinued. Holt Ch. J. said, it is certain that the action may be discontinued by such assent of the defendant, and that even after verdict it may be discontinued by such assent, and that there was *no difference (in respect to the discontinuance) between a verdict upon issue joined and a verdict upon a writ of inquiry*; and it was held, that the plaintiff could not by law discontinue without the assent of the defendant. Carth. 86, 87. Mich. 1 W. & M. in B. R. Stephens v. Etherick.

(E) In what Cases the Court ought to have given Consent to a Discontinuance.

[1.] If the parties demur in law, and after the plea is not continued in the roll for a year, and one party prays a discontinuance, if the other does not pray the contrary, the use is for the Court to grant the discontinuance. H. 37 Eliz. Banco, between FULLWOOD AND WARD, by the clerks.]

[2. But if the other party prays a continuance of the plea, the Court in discretion hath used to continue it. H. 37. Eliz. B. between FULLWOOD AND WARD, adjudged.]

Ibid. 415.
pl. 550.
JENKIN-
SON v.
ALLSON.
Mich. 1675.
S. P. and
seems to be
S. C. and

III. In debt on obligation to perform an award, the plaintiff in his replication had ill assigned a breach, and therefore prayed leave to discontinue; but because the award was for the payment of money, the Court would not give leave, for they said he might have his action of debt upon the award. Freem. Rep. 410. pl. 541. Trin. 1675. Anon.

Twissden said, that he had known leave to discontinue denied where the award was for payment of money only, because he might have action of debt; but here the plaintiff had leave to discontinue paying costs. — 3 Keb. 556. pl. 68. Mich. 27 Car. 2. B. R. S. C. says, that the award not being excepted to, and the breach for money, the Court granted leave to discontinue or amend, paying costs, though there are other remedies by debt on the award.

IV. The defendant appeared by attorney where he ought to appear by guardian, and affidavit was made that the attorney had notice of the infancy at the time of his appearance, and afterwards bragged that he would arrest the judgment for that reason, whereupon the Court gave the plaintiff leave to discontinue, &c. Comb. 63, 64. Mich. 3 Jac. 2. B. R. Peter's case.

[E. 2] [In what Cases the Defendant may enter the Continuance].

[3. If the plaintiff be nonsuit, by which the defendant is to recover costs if the plaintiff will not enter his continuances on purpose to save the costs, the defendant shall be suffered to enter them, and so recover his costs. P. 8 Jac. B. Yeo's case, per Curiam.]

[E. 3] [*And how much shall be said to be discontinued.*]

[4. If the defendant in his demand leaves out parcel of his demand comprised in the original in his process, all is discontinued. 18 E. 3. 42. b.]

[5. If a man vouches for parcel, and as to the rest makes no answer, and the demandant does not take advantage thereof by prayer of seisin, but suffers the process to be continued against the vouchee in right of the parcel, all is discontinued. 18 E. 3. 40. b.]

[6. If the tenant vouches for all the demand, and the process upon the voucher is made for less than it is, all is discontinued. 18 E. 3. 40. b.]

[7. In an action of trespass a discontinuance in parcel is a discontinuance in the whole. 7 H. 6. 27.]

S. P. for the damages are intire. Br. Discontinuance de Process, pl. 20. cites S. C.

[8. In trespass if the discontinuance be after issue, this shall be a discontinuance of the original and all. Contra 30 Ass. 36. adjudged, for the replender shall be where the discontinuance began.]

Br. Discontinuance de Process, pl. 30. cites S. C. of trespass against two, who pleaded several pleas to issue, and process continued against the inquest, and in the process mention only was made of him who first pleaded, without any mention of the other, and after it was found for the plaintiff, and the other alleged the discontinuance, whereupon they commenced where the first fault was, and quashed the residue, and then a new ven. fac. issued, making mention of both. Br. Repleader, pl. 28. cites S. C.

[9. If an assise be adjourned before themselves at Westminster, and after in Banco for difficulty, and at the day the record is not sent, nor the parties demanded, all is discontinued. 22 E. 3. 3. b.]

Fitsh. Discontinuance, pl. 9. cites S. C. and though nothing, &c.

the record was sent in the third after, yet they thought it a discontinuance, and so did

X. In debt, the defendant by attorney, to part, waged his law, and had day to perform it, and pleaded to the country for the rest, and at the day of the law the defendant was effoined, and for the rest it passed for the plaintiff by nisi prius, and he prayed judgment. Markham said, the process is discontinued; for the attorney was effoined after the ley gager, where he is out of court as to this, in as much as the law shall be performed in person, and process is entire. Br. Discontinuance de Process, pl. 21. cites 19 H. 6. 30.

XI. But Brook says it seems, because he remained attorney for this part, which was pleaded to the country, therefore it is discontinued for the other part, but not for this, therefore quare. Br. Discontinuance de Process, pl. 21. cites 19 H. 6. 30.

XII. Trespass against three by the baron and feme de clauso fracta, and of menacing his tenants, and the writ was tenentibus suis, and the count was tenentibus of the baron only, and was made three terms since, by which, per Danby, Chock, and Needham, discontinuance in parcel shall abate the writ in all. Br. Discontinuance de Process, pl. 37. cites 7 E. 4. 10.

XIII. *As in trespasss of trees cut, and goods carried away and no mention of goods carried away in the count, there the count shall abate in all; for it is no warrant of the writ.* Br. Discontinuance de Procefs, pl. 37. cites 7 E. 4. 10.

XIV. *And in trespasss against two, if the procefs against the one be discontinued, the writ shall abate in all, per Danby Ch. J. But* [481] *because the roll was well, therefore no more was thereof said; for it was of the baron and feme.* Br. Discontinuance de Procefs, pl. 37. cites 7 E. 4. 10.

[E. 4] [In Pleading by answering to Part only.]

a Bulst. 335.
S. C. ad-
judged.

* Fol. 488.

Roll. Rep.
135. pl. 15.
and 176,
177. pl. 15.
S. C. ad-
judged
against the
plaintiff;

but Roll makes a quere, why judgment should not be given against the defendant for not answering to all the matter in the declaration, and cites the cases of † Bawle v. Norris, and 14 Jac. † Denne's case.

† Roll. Rep. 216. pl. 12. S. C. adjudged against the defendant, because no answer was given as to part.

† Roll. Rep. 406. pl. 38. S. C. and Henden said, that if the plaintiff would have taken advantage of the not answering to part, he ought to have made a special demurrer for this cause, but Curia seemed e contra, viz. that he should have advantage of the not answering to part by the demurrer, and that it shall not be discontinued; and judgment was given for the plaintiff. — S. C. cited Ld. Raym. Rep. 716.

Brownl. 192.
S. C. seems
only a trans-
lation of
Yely.

11. *In trespasss for breaking his house, and taking and carrying away his goods, the defendant justifies all the trespasss. The plaintiff quoad fractionem domus, and the taking the goods, nec non materia in ea contenta, demurs upon the defendant's bar, and the defendant joins in demurrer thus, viz. quia placitum prædictum quoad fractionem domus, and the taking the goods sufficiens, &c. and thereupon judgment is given in C. B. for the plaintiff, but reversed in error in B. R. for in the offer of the demurrer ex parte querentis, nothing is alleged specially, but quoad the breaking the house and taking the goods; and though the subsequent words, viz. nec non materia in ea contenta goes to all the matter in the bar, viz. the carrying away also, yet when the defendant joins in demurrer, he joins specially only, viz. quoad the breaking the house and taking the goods, but says nothing as to carrying them away, and so as to that nothing is put in judgment of the Court, yet the writ to enquire of damages is for the whole, and the judgment also; and the carrying away being parcel of the matter, and for which greater damages are adjudged, and this not being put in judgment of the Court, by the demurrer, the judgment is erroneous; and as*
to

to the carrying away (which is part of the matter), it is a discontinuance. Yelv. 5, 6. Trin. 44 Eliz. B. R. Johnson v. Turner.

12. In *trespass vi & armis*, the plaintiff declared of *entering into his warren, digging his land, and chasing and taking his conies*. The defendant, *as to the digging and chasing, he justifies for common there, but answers nothing as to the entering into the warren, neither by confession nor traverse*, and therefore Haughton J. held, that all was discontinued according to 4 Rep. HERLACKENDEN'S CASE, and to this the whole Court, absente Fleming, agreed. Brownl. 227. Trin. 11 Jac. Carril v. Baker.

So in *trespass quare clausum fregit* pedibus ambulando, &c. & cum avertis depasturat, conculcat, with oxen, horses, cows,

sheep, and bogs. The defendant pleads, *quoad venire vi & armis, nec non totam transgressionem prædictæ præter pedibus ambulando, & præter the horses, oxen, sheep, and cows, not guilty; but says nothing as to the bogs*; this is a discontinuance in pleading. Cart. 51. Hill. 17 & 18 Car. 2. * C. B. Ayre v. Glossam. — So in *trespass, for taking several sorts of grain*, the defendant justified the taking but of part, and said nothing of the residue; this is a discontinuance, and the general words, *quoad residuum transgressionis* will not help, because he goes to particulars afterwards, and does not enumerate all, and judgment accordingly. 2 Mod. 254. 259. Trin. 29 Car. 2. C. B. Walwin v. Awberry.

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13. The defendant concluded his plea in disability, and the plaintiff his replication in bar. The whole is discontinued. Carth. 137. Pasch. 2 W. & M. in B. R. Bisse v. Harcourt.

Indebitatus assumpsit. The defendant pleaded an attainder

of high-treason in disability. The plaintiff replied a pardon, prout per exemplificationem inde, &c. which was held good, & petit judicium & damna sua. Upon demurrer it was held, that there was a discontinuance, by the misconception of the replication; for an ill prayer of judgment is, as none. 1 Salk. 177. pl. 1. Pasch. 2 W. & M. in B. R. Bisse v. Harcourt. — 10 Mod. 112. S. P. Mich. 11 Ann. B. R. in case of Alice v. Gale.

14. In case, the defendant concluded in abatement, and the plaintiff demurred as to a plea in bar, and so concludes petit judicium & damna; per Cur. it is a discontinuance. Carth. 187. Pasch. 3 W. & M. in B. R. Carter v. Davis.

1 Salk. 218. pl. 2. S. C. held accordingly, but issue being joined on

the other promise, the Court stayed proceedings on the demurrer, saying the discontinuance would be helped by the verdict. — 2 Show. 255. S. C. — G. Hist. of C. B. 209. S. P. that it is a discontinuance, because he does not maintain the writ. — 1 New. Abr. 15. S. P. in totidem verbis.

15. Demurrer to a demurrer, is a discontinuance; per Holt Ch. J. Cumb. 323. Pasch. 7 W. 3. B. R. Saint-John v. Campbell.

1 Salk. 219. pl. 4. Trin. 6 W. & M. in B. R. S. C. and

says that there is no difference between pleading over when issue is offered, and not joining in demurrer, but pleading over; that both are alike, and make a discontinuance.

16. If defendant pleads as part, and says nothing as to the rest, it is a discontinuance, unless plaintiff will take judgment by nil dicit; per Cur. 12 Mod. 421. Mich. 12 W. 3. Morley v. —

17. Assumpsit upon three promises for 55 l. each. The defendant, as to the 55 l. in the first count, pleaded *actio non*, for that the three several promises in the count mentioned were for the same sum of 55 l. which the defendant had paid to the plaintiff before the action brought, judgment si actio. The Court held the whole discontinued by pleading only to the first of the promises

mises

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mises, so that plaintiff should have taken judgment by nil dicit on two of them, and by his not doing it the whole is discontinued; for the defendant had fixed his plea by the beginning to the first promise, and therefore the special matter following will not aid it.

But afterwards, this being all done in Mich. term, and no continuance entered on the roll, the plaintiff entered up judgment by nil dicit on the two promises, to which the defendant did not plead; and upon reference to a master the Court approved thereof, and judgment the next term was given for the plaintiff. *Ld. Raym. Rep. 716. Hill. 13 W. 3. B. R. Vincent v. Beston.*

Per Holt Ch. J. if a plea begin with an answer to part, the whole plea is naught, and the plaintiff may demur; but if a plea begins only

18. *Replevin for taking cattle in quodam loco vocat' the brills & in quodam alio loco ibidem vocat' the boggs.* The defendant avowed the taking in *predicto loco in quo*, &c. quia H. was seised in fee of the locus in quo, &c. The plaintiff demurred, because here are two places alleged, and the avowant has only answered to the locus in quo, &c. which is but one of the two places; and per Cur. it is a discontinuance. *1 Salk. 94. pl. 5. Mich. 13 W. 2. B. R. Weeks v. Speed.*

as an answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by nil dicit; * for if he demurs or pleads over, the whole action is discontinued. *1 Salk. 179. pl. 6. Mich. 13 W. 3. B. R. Weeks v. Peach. S. C.*

* [483]

11 Mod. 34. pl. 5. Mich. 3 Ann. Anon. S.C.

19. *Debt upon bond of 500 l. the defendant as to 225 l. part of it, pleads payment, &c.* The plaintiff demurred, and per Cur. this is only a plea to part; for in debt on a bond a man may have several pleas; as suppose a plaintiff sues as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff. So a man as to part may plead payment, and as to the rest an acquittance, and so there being no answer to the residue, here is a discontinuance for the residue; and the plaintiff should have taken judgment by nil dicit. *1 Salk. 180. pl. 9. Hill. 3 Ann. B. R. Market v. Johnson.*

20. If a man justifies to the whole, and his plea goes but to part, the plea is bad, because the thing pleaded as to the whole, and going but to part, being an insufficient answer to the whole, consequently the plaintiff must have judgment; and if the plaintiff on such plea does not demur, but takes issue, since he takes it on a bad bar, whether the issue be found for the plaintiff or defendant, the judgment shall be for the plaintiff, because the bar is insufficient; for though the issue should be found for the defendant, yet that will not amend the bar, and make that go to the whole which goes to part only; and therefore here the issue is material. *Gilb. Hist. of C. B. 126, 127.*

See pl. 18. and the note there.

21. But if the defendant had pleaded a bar to part, and says nothing to the residue, there the plea is good as to the part to which it is pleaded, and nothing being said as to the residue, the plaintiff ought to have judgment for want of a plea as to the residue; if he does not take judgment it is a discontinuance of his action, for the defendant having said nothing, if that nihil dicit be not entered, there being no continuance of that part of the action by what the defendant

defendant hath said to it; nor the plaintiff likewise having said any thing to it to continue it in court, it is a discontinuance; and if any part of it be discontinued, it is a discontinuance in the whole; for *there is not the same demand subsisting that the plaintiff had set forth in his declaration*; but if the plaintiff takes issue and obtains a verdict, the discontinuance is aided by the statute of jeofails, which cures all discontinuances before verdict, for the issue is immaterial, because the issue is not material to every thing to which the plea is pleaded, for being not material as to the whole, it was in that case an immaterial issue. Gilb. Hist. of C. B. 127.

22. Where the plaintiff declares in *Mich. term before Crast Animar* so as to have a plea to enter of that term, and the defendant gives him a plea to part only, and the plaintiff enters his plea as of *Hill. term*, and upon demurrer in *Hill. term* the defendant objects the discontinuance, and desires the plea may be entered as of the term in which it was pleaded, the Court would not interpose to make them enter their plea on the rolls of *Mich. term*, because if the Court had done this, the plaintiff's action must have been discontinued by such rule, whereas the plaintiff having given the defendant an imparlance when he needed not, it is not erroneous, or any wise prejudicial to the defendant, and the plaintiff has the whole *Hill. term* to take judgment for the part not pleaded to, and therefore there could be no discontinuance during *Hill. term*. Gilb. Hist. of C. B. 127, 128.

23. But if an action of debt be brought against an executor or administrator, and he pleads several judgments to cover the assets, and as to some of the judgments the pleas are good, and as to some bad, this is a discontinuance of the plaintiff's action, because the plaintiff's demand remains the same, and is still pursued; and since the judgments of some are avoided by a good plea, and all the judgments amounting but to one cover of the assets, if one of them be avoided the plaintiff must have judgment for the whole, because there is not a sufficient bar to his demand, since the whole avoidance of the plaintiff's demand to charge the assets amounts but to one bar. Gilb. Hist. of C. B. 128.

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24. *Trespass* for going over the plaintiff's close with horses, cows, and sheep; the defendant justifies for that he has a way for horses, cows and sheep, and says that such a day he went over with horses; and upon demurrer it was adjudged ill; for it is a justification only for horses. Judgment for the plaintiff; but the reporter, a quære. 11 Mod. 219. pl. 8. Pasch. 1709. 8 Ann. B. R. *Roberts v. Morgan*. Holt's Rep. 168, 569. S. C. adjudged per Holt Ch. J. & Cur.

(E. 5) Entry of them; in what Cases, and how and when.

1. R. Recovered in action of account against A. and capias ad computandum was awarded, and thereupon A. was taken and entered into the account before J. T. and R. L. who were Vol. V. N n assigned

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assigned auditors, and before them pleaded a release of one J. B. by whose hands he received the money to bail over to R. Upon this plea R. demurred in law, and at the day appointed for arguing a demurrer, the defendant insisted that the cause is discontinued, because there is *no continuance from Hill. term to Easter term*; but it was answered that in C. B. no discontinuance shall be entered but after the year. But afterwards it was held clearly to be in the discretion of the Court to enter it or not; and it was discontinued. Sav. 54. pl. 115. Pasch. 25 Eliz. Ronyan v. Atward.

2. In debt upon a bond there is *issue joined as to part and demurrer joined as to the rest, both are continued for a long time by Curia advisare vult, &c.* but at last a discontinuance is recorded, viz. *recordatur per Cur. such a day of May termino Paschæ anno, &c. quod illud placitum non habet diem ultra octobas Sancti Hillarii.* 1 Salk. 180. cites Co. Ent. 142.

3. If a *new seire facias* be taken out every year, one continuance may be entered at any time by the attorney in his chamber, otherwise not; *quod Curia concessit.* Keb. 159. pl. 110. Mich. 13 Car. 2. B. R. Weldon's case.

4. By the course of C. B. continuances may be entered *before the return*; agreed by the clerks. Keb. 160. pl. 110. Mich. 13 Car. 2. B. R. in Weldon's case.

5. On leave granted to *discontinue after issue joined*, the Court held it *needless to enter the discontinuance*; *contra on a nolle prosequi*; but the clerks said it is usual to enter on the roll, *ideo discontinuatur.* But this being a rule of a former term, the defendant cannot cause the rule to be entered (if the plaintiff refuses it) without motion. Keb. 574. pl. 33. Mich. 15 Car. 2. B. R. Baltin-glass v. Temple.

6. Plaintiff had judgment in Hill. term 1722, three years past, which was signed 14th February, two days after the term, execution bore teste 12th Feb. and the warrant to the sheriff was dated 28th March. It was moved, that though this for the benefit of purchasers for a valuable consideration by the stat. 29 Car. 2. cap. 3. shall be judgment only from the signing and entry of the month and year upon the paper of record; yet in respect of the plaintiff and defendant, and as to all other purposes, it is a judgment of Hill. term 1722, by fiction of law; so that the teste of the execution ought to be the first day of that term. And the Court denied leave to enter continuances, this being now a record of three [485] years standing; neither would they give leave to enter the judgment as of the succeeding term, though in fines which are the agreements of parties it has been done, whereas judgments are in adversary suits; therefore the judgment in the principal case must be of the first day of Hill. term; but as to quashing the execution the Court afterwards was divided. 8 Mod. 310. Mich. 11 Geo. 1. Graves v. King.

(F) Discontinuance of Process. *In what Actions a Discontinuance against one shall be a Discontinuance against others.*

[1. **I**N *trespass against three*, a discontinuance of process against one, is a discontinuance against all. 39 Ed. 3. 3. * 30
Aff. 36.]

* Br. Discontinuance de Process, pl. 30. cites S. C.

Br. Repleader, pl. 28. cites S. C. — S. C. cited Ld. Raym. Rep. 599. — *Trespass against two*, who pleaded not guilty, and after the one died, the writ shall not abate; but yet, per Marten, discontinuance of process against the one in trespass is discontinuance against both; and it appears there, that in this case the process cannot be discontinued against the dead person, nor the process which was against two cannot be continued against the one, therefore *new venire facias shall issue*. Br. Discontinuance de Process, pl. 19. cites 7 H. 6. 21.

Trespass against two, and process is continued against the one, and not against the other, this is no discontinuance against the other, but is misprison and shall be amended, and so it was. Br. Discontinuance de Process, pl. 55. cites 22 E. 4. 3. — Br. Amendment, pl. 76. cites S. C.

[2. If a man brings a writ of *error upon an outlawry of felony*, and assigns for error, that he was in prison at the time, and the king maintains that he was at large upon a venire facias issued, and process against the lords mediate and immediate, the lords come and allege, that his imprisonment was by his own covin, upon which a venire facias issues; and after, for default of jurors, a continuance is made between the king and the party, and no continuance between the lords and the party, by which the process is discontinued against the lords; this shall be a discontinuance of all. 38 Aff. 17. adjudged.]

Br. Discontinuance of Process, pl. 31. cites S. C. and therefore a new venire facias issued. quod nota. — Br. Utlagary, pl. 40. cites S. C.

[3. If a writ be brought against several tenants by several *præcipes*, though the process is discontinued against one in a *præcipe*, yet it is not any discontinuance against the other tenants. 27 E. 2. 87. b.]

[4. [So] If a man brings debt against two by several *præcipes*, if the process be discontinued against one, it shall not be a discontinuance against the other also. 7 H. 6. 27. per Curiam.]

S. P. for the damages are not intire. Otherwise it is of a non-

suit. Br. Discontinuance de Process, pl. 20. cites S. C. — Br. Nonsuit, pl. 19. cites S. C. & S. P. — In debt against two by several counts and one *præcipe*, a nonsuit as to one is a nonsuit as to both; for the writ is one, and the pledges de prosequendo are the same; but a discontinuance against the one is not a discontinuance against the other; for there are two several declarations against them, and the continuances are always after and pursuant to the count. Jenk. 309. in pl. 87.

5. It seems that in assise against several, the one pleads a foreign deed, the others shall not have day in court till this issue be tried. Br. Assise, pl. 234. cites 22 Aff. 11.

6. Replevin against three of a taking in S. the one appeared and avowed for himself in B. and traversed the taking in S. and made avowry to have return, which passed for the plaintiff, and he prayed judgment, and by the best opinion, because no process was made against the other two they shall not appear nor answer, and it is all discontinued. Br. Discontinuance de Process, pl. 8. cites 49 E. 3. 24.

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7. *But, per Par. and Kirton, clearly, if the avowry had been made for him and for the others, process shall not be made against the others. Ibid.*

8. *But, as here also, it is not properly in nature of avowry, but is upon plea to the writ upon the view, in which case all ought to appear and plead, or process shall be made or continue against those who make default, for otherwise it is discontinuance. Ibid.*

9. *And by 21 E. 3. fo. 20. in replevin against two, the one avowed for himself, and confessed for his companions, and therefore the plaintiff could not have process against the others; for he is out of the court. Ibid.*

10. *And in replevin against two, the one avowed and the other justified who came in aid of him, there if process be not continued against him who justified, the writ shall abate; per Cur. for there he once pleaded, which varied from this case. Ibid. cites 21 H. 6. 23.*

11. *Trespass against two, the one came by distress and pleaded not guilty, and was found guilty, and the other is outlawed upon exigent where no pluries capias is returned, it is held error by Radford, and the argument was because they were severed in process, whether one shall take advantage of the other's process or not? and it is said there, that the like point is 12 Ric. 2. where it is awarded that one shall have advantage of ill process continued against the other, though they were severed in process, so that the process against one is not the process against the other. Br. Error, pl. 54. cites 46 H. 5. 9.*

12. *But one shall not have advantage of the other's count, contra of discontinuance of process. Br. Ibid. cites 46 E. 3. 25, 26.*

13. *And discontinuance of process in trespass against the one is discontinuance against both. Br. Ibid. cites 7 H. 6. 27.*

14. *At the venire facias W. B. was returned, and in the habeas corpora J. B. and not W. B. and that the said J. B. is dead, and in the distress W. B. was returned again, which was shewn for discontinuance when the inquest was ready to pass; and per Cur. this is discontinuance against all the jurors, and cannot be amended. Br. Discontinuance, pl. 47. cites 27 H. 6. 5.*

15. *And 34 H. 6. 20. misprison shall be amended, but discontinuance of process shall put the party to new original. Ibid.*

16. *None shall have advantage of discontinuance but parties or privies to the record, and not strangers, though the action was founded against him upon the same record, by the best opinion. Br. Discontinuance de Process, pl. 54. cites 21 E. 4. 33.*

17. *A. B. and C. executors, recovered by default. The defendant brought error, and assigned a discontinuance, viz. that the suit being by three executors, and at the day, which they had by the roll upon a continuance taken, only two appeared, and by the same roll day was given to all three to another day. Adjudged per tot. Cur. to be a discontinuance, and not amendable; for credit must be given to the roll, and non constat by that, but that two only appeared, and the third made default, which is a non-prosecution by him at that day, and goes to all the suit and time after; and cites * 21 E. 4. 3. Yelv. 155. Trin. 7 Jac. B. R. Paston v. Luther.*

* This is misprinted, and should be 22 E. 4. 1.

(F. 2) In what Court it may be; and Pleading thereof in other Court.

1. *SCIRE facias* to repeal letters patents of the king. The defendant said, that there was other *scire facias* of this matter brought by the plaintiff, which yet pends, &c. The plaintiff said, that this is discontinuance, and was in the Chancery; per Tirwit, in the Chancery is no discontinuance; quod tota Curia negavit. Br. Discontinuance de Procefs, pl. 9. cites 3 H. 4. 6.

2. It was admitted, that discontinuance may be in the county or court baron, and yet the plea may be removed; for if it be well continued, nothing shall be removed but the original, and therefore all is one. Br. Discontinuance, pl. 42. cites F. N. B.

(G) Discontinuance. By Death of the King.

1. *SURETY* to keep the * peace, or to keep a day of payment, are discharged by death of the king; contra of surety to sue with effect in writ of account where the defendant is let to mainprife. Br. Prerogative, pl. 58. cites 1 H. 7. 2.

*Br. Surety, pl. 20. cites 1 H. 7. 1. S. C. and says it was affirmed for law. 1 M. 1.

2. In appeal of the death of a man, the writ was abated by the death of the king, and the appellant should not have re-attachment if he did not sue within the year as well as the original. Thel. Dig. 184. lib. 12. cap. 7. f. 1. cites Hill. 2 H. 7. 10.

3. Where a man is outlawed upon indictment of felony, if the king be dead pending the exigent, this outlawry is reverfable by error; for the exigent was abated by death of the king, but he shall answer to the felony; but otherwise it is where such voidable outlawry passes against one at the suit of the party, for there if the outlawry be reversed, he shall not be put to answer to the party. Thel. Dig. 184. lib. 12. cap. 7. f. 2. cites Mich. 7 H. 7. 5.

4. If a man be indicted of felony in the time of H. 8. and the king dies, he shall be arraigned thereof in the time of E. 6. per all the justices. But by some, this indictment shall be removed by certiorari from the old custos rotulorum, and sent to the new commissioners. Br. Corone, pl. 177. cites 1 E. 6.

Br. N. C. 79. b. cites S. C. — If one be indicted in the time of one king, and

pleads to issue, and after the king dies, he shall plead de novo. 7 Rep. 32. a. cited per Cur. as EDWARD SMITH'S CASE, who pleaded to issue upon an indictment of felony in Middlesex, in 3 & 4 P. & M. in B. R. and after the death of Queen Mary he re-pleaded in 3 & 4 Eliz. and was acquitted; and so in PALMER'S CASE, who was arraigned in B. R. on a nonsuit in appeal, at the suit of the Queen, Trin. 4 & 5 P. & M. and pleaded to issue, and Queen Mary died, and Mich. 1 & 2 Eliz. he repleaded. — Jenk. 205. pl. 32. S. P. by all the justices. — Cro. J. 14. pl. 18. S. P.

5. 1 E. 6. cap. 7. f. 1. By the death of the king any action between party and party, in any courts of record, shall not be discontinued, but the procefs in every action shall stand good, as if the king had lived, and all judicial procefs shall be made in the name of the king that shall reign, and that variance between the names of the king shall not be material.

At common law, upon the demise of the king, all suits depending in the king's courts were

discontinued, so that the plaintiffs were obliged to commence new actions, or to have resummons or re-attachment

re-attachment on the former process to bring the defendant in; and therefore to prevent the expense and delay on these occasions was this statute made. Gilb. Hist. of C. B. 193, 194.—1 New Abr. 7. (E) S. P. in totidem verbis.

6. S. 2. *Every assise of novel disseisin, mortdancestor, juris utrum, and attain, which shall be arraigned, or sued before any justices of assise, shall not be discontinued by death, new commission, association, or coming of the justices.*

See tit. Justices of Gaol Delivery, 87. pl. 12. and the notes there.

7. S. 5. *Where any person shall be found guilty of treason or felony, for which judgment of death shall ensue, and shall be reprieved to prison without judgment given, those persons that at any time after shall by the king's letters patents be assigned justices to deliver the gaol where such person shall remain, shall have power to give judgment of death against such person.*

8. *In a popular action the king died after demurrer upon the evidence, and before judgment, and the defendant pleaded de novo.* 7 Rep. 31. a. cites 5 E. 6. Rot. 38.

7 Rep. 30. a. S. P. for the words of the statute are, "de- pending in any court." —And.

9. It was resolved upon the stat. 1 E. 6. cap. 7. that an original writ not returned at the death of the king cannot be returned in time of the next king; but all process made upon any * original pending in any court of record in time of the former king, may be executed and returned in time of the succeeding king, by the clause in the statute to such purpose. D. 165. pl. 1. Mich. 1 Eliz.

44, 45.

1 E. 6. S. P. resolved.—Bendl. 79. pl. 121. S. P. resolved.—But a latitat is within the statute 1 E. 6. and is not lost by demise of the queen; for it is not any original writ, but is in nature of an execution grounded upon a record precedent; for every latitat is founded on a bill of Middlesex precedent, and supposes that the party cannot be taken by the sheriff of Middlesex, quia latitat & discurnt in another county; so the latitat issues upon a suit or queritur supposed to be depending. Yelv. 52. Mich. 2 Jac. B. R. Everard v. Blach.

10. A writ of extent upon a statute was executed in the time of Queen Mary, returnable quindena Martini, before which the queen died, yet it was returned, and a liberate granted Hillary following, being in the time of the next queen. It is left a quere in the book if the return of the extent was not without warrant, because by demise of the queen the warrant to make executions ceased, and it is not remedied by stat. 1 E. 6. D. 205. b. Mich. 3 & 4 Eliz. in the case of Gery v. Smart.

Cro. J. 14. pl. 18. Paich. 1 Jac. S. P. resolved.— 7 Rep. 31. a. S. P. resolved.

11. *Quare impedit* brought in name of the king abates by his demise; for it concerns the king in individuo. Jenk. 205. pl. 33.

12. But *intrusion* into the lands of the king, or *infirmation*, shall not abate by his demise, because these concern publicum commodum, and profit of the king. Jenk. 205. pl. 33.

13. The statute 1 E. 6. extends only to actions, suits, &c. between party and party, and consequently extends not to cases where the king is party. 7 Rep. 30. b. Trin. 1 Jac. in case of discontinuance of process, &c.

And. 45. pl. 113. S. P. resolved.— Bendl. 79. pl. 121. S. P. resolved.

14. Since the stat. of 1 E. 6. if any judicial writ or process in any court of record be awarded in one king's reign, it may be executed in the time of his successor. 7 Rep. 30. a. Trin. 1 Jac. in the case of discontinuance of process, &c.

15. So in *appeal of death*, if the writ be delivered to the sheriff within the year, and before the return, or any thing done by the sheriff, the king dies, this shall be remedied by the common law, viz. by certiorari returnable in B. R. and thereupon the plaintiff shall have re-attachment, though it comes not in by the return of the sheriff, but by certiorari, and this for necessity; for otherwise the plaintiff, who lawfully purchased his writ within the year, shall lose his appeal without any default, the year being now past; and therefore since by act in law the writ is discontinued, the law will give means to revive it, so as that the party shall not be without remedy. 7 Rep. 30. a. b. Trin. 1 Jac. the case of discontinuance of process. [489]

16. *Informations for the king alone in any Latin court*, and likewise informations *tam pro parte quam pro domino rege*, do not abate upon the demise of the king, but shall be re-continued by *re-summions* or re-attachment, and the defendant shall plead to them *de novo*; and informations in English courts shall not abate, because there are no continuances in them. Resolved by the justices. Mo. 748. pl. 1027. anno primo Jac.

7 Rep. 30. b. 31. a. S. P. resolved, that if an information be preferred, and the defendant pleads to issue, or de-

murrer be joined, and afterwards the king dies, all the proceedings shall abate, but the information shall stand. 7 Rep. 30. b. 31. a.—Cro. J. 14. pl. 18. S. P. resolved.

In all cases when the king is only party, or when the information is *tam pro domino rege quam pro seipso*, and the king dies before the judgment, all the proceedings on the information are lost, because that king who was party is dead; but the information or indictment shall stand; for as there are several penal statutes which are to be prosecuted within a limited time, which would be lost if the information which was brought in due time were abated, the law will not permit that the act of God should protect those from being punished who had broken the laws *pro bono publico*. Thus stood the law till * 7 Anne, cap. 8. Gilb. Hist. of C. B. 174.

* This is misprinted, and should be 1 Anne, cap. 8.

17. *At common law*, by demise of the king the plea was discontinued, and the process which was awarded, and not returned before the death of the king, was lost; for by the writ of the predecessor nothing can be executed in the time of the new king, unless in special cases; because by the king's death not only the justices of the one Bench or the other, and barons of the Exchequer, but likewise the sheriffs and escheators, and all commissions of oyer and terminer, gaol-delivery, and justices of peace, are determined by the death of the predecessor who made them; and to remedy this the stat. 1 E. 6. was made; resolved, 7 Rep. 30. a. Trin. 1 Jac. in case of discontinuance of process.

18. *At common law*, if a verdict had passed for the defendant, and before the day in Bank the king had died, the plea is discontinued, and the defendant might by certiorari remove the record, and though the parties had never pleaded any plea, yet the defendant ought to sue a *sci. fa.* and thereupon to have judgment; but without *sci. fa.* he shall not have judgment, because the parties have no day in court, and the *sci. fa.* shall revive the record, and give day to the parties against the opinion of Littleton, 10 E. 4. 13. b. though he said it was so adjudged, that the defendant in such case should have judgment immediately; per Cur. 7 Rep. 30. a. Trin. 1 Jac. in case of discontinuance of process.

19. If a man purchases a *formedon* against the *pernor* of the *parish* within the year after the title accrued, and before the return of the writ the king dies, the writ shall be removed into C. B. by *certiorari*, and thereupon he shall have re-*summons* because of the mischief, as it is held in 10 E. 4. 13. b. 14. a. 7 Rep. 30. b. Trin. 1 Jac.

20. Before the act of 1 E. 6. cap. 7, if a man had been indicted and convicted by verdict or confession, before any commissioners, and before judgment the king had died, in this case no judgment could have been given, because the king, for whom judgment should be given, is dead, and the authority of the judges who should give the judgment is determined; resolved, 7 Rep. 31. b. Trin. 1 Jac.

21. A *latitat* issued in 2. Eliz.'s time, and was served in time of King James. The defendant rescued himself, and the sheriff returned the rescous. It was moved, that the *latitat* was abated by the queen's death, and so the arrest ill, and consequently this was not a rescous. But the Court held a *latitat* to be within the [490] stat. 1 E. 6. which is not lost by the demise of the queen; for it is not any original writ, but is in nature of an execution grounded upon a record precedent, every *latitat* being founded on a bill of Middlesex precedent, and supposes that the party cannot be taken by the sheriff of Middlesex, quia *latitat* & *discurrit* into another county, and so issues upon a suit or plaint supposed to be depending. Yelv. 52. Mich. 2 Jac. B. R. Everard v. Blach.

22. The death of the king is called *demise*, because in law he never dies, but leaves his crown to another. Fin. Law, 8vo. 433.

23. A writ of error is a suit, and the plaintiff may be nonsuit in it, and if it be returned, it will not be discontinued by the demise of the king. Latch. 110. Hill, 1 Car. Cole's case.

Palm. 404. S. C. accordingly; for it is process.

24. C. recovered in *quare impedit* against B. and now sued a *scifa* against B. the incumbent, who pleaded a release, which was found against B. Afterwards the king died, and it was moved, that it is discontinued by death of the king, as an extent, &c. sed non allocatur. Lat. 72. Pasch. 1 Car. Catesby v. Baker.

Palm. 422. Pasch. 1 Car. B. R. Dixey v. Brown, S. C. in totidem verbis. — Lat. 114. Watkins's case, Pasch. 2 Car. S. C. in totidem verbis. —

3 Buft. 314, 315. Dicks v. Brown, S. C. — Noy, 77. S. C. accordingly.

Palm. 422, 423. Dixey v. Brown. S. C. and Lat. 114. Watkins's

25. Executor of an executor was sued for legacies, and pleaded no assets, which was refused by the Spiritual Court, and therefore prohibition was awarded out of B. R. in the time of King James; and upon debate the Court resolved, that this was discontinued; and the difference taken was, between a prohibition awarded out of B. R. and out of C. B. for out of C. B. a prohibition shall not be awarded without suggestion first of record, and so it is there the suit of the party, but in B. R. it is otherwise, and is only prohibitory. D. 165. a. Marg. pl. 3. cites Pasch. 2 Car. B. R.

26. Another difference is when a prohibition issues out of B. R. if no other process be upon it, there it is discontinued by demise of the king; but if attachment issues and is returned, or if the party appears and puts in bail, then it is become the suit of the party,

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party, and is not discontinued. D. 165. a. Marg. pl. 3. cites Pasch. 2 Car. B. R.

case. S. C. in totidem verbis.

27. In action of *scandalum magnatum*, the Court is tam pro domino rege quam pro seipso, this is not discontinued by demise of the king; for *the contempt to the king is collateral*, though otherwise it is where the king shall recover part; per Doderidge, D. 165. a. Marg. pl. 3. cites Pasch. 2 Car. B. R.

Palm. 422, 423. Dixey v. Brown. S. C. & S. P. & Lat. 115. Watkins's case, S. C.

& S. P. in totidem verbis.—3 Lev. 207. S. P. held accordingly,

28. In an action of debt, *qui tam*, &c. upon the 23 Eliz. for *recusancy in not coming to church*, after demurrer by the defendant the king died. It was resolved by all the judges at Serjeant's Inn, that this action was at the suit of the party, and that the king cannot discharge it, and therefore shall not abate. Hutt. 82. Trin. 2 Cas. Farrington v. Arundel,

Cro. E. 10. pl. 1. Farrington's case, S. C. resolved accordingly.—S. C. cited by the justices. 3 Lev. 207,

29. Upon an outlawry and plea, and replication and demurrer to it, after extent the protector died, and the Court was of opinion that all ~~but~~ the outlawry and the extent upon it was gone by the death of the protector, as in 7 Rep. the case of discontinuance of process; et adjournatur. Hardr. 136. pl. 7. Mich. 1658. in Scac. The Protector v. St. Johns.

30. 4 & 5 W. & M. cap. 18. Upon the demise of any king or queen of this realm, all pleas to information shall stand without calling the defendant to plead anew, unless the defendant requests the Court for that purpose within five months after such demise.

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31. 1 Ann. stat. 1. cap. 8. §. 4. No writ, plea, or process, upon any indictment or information for misdemeanor; or any writ, process, or proceeding, for any debt or account that shall be due to her majesty, her heirs or successors, for any lands or other revenue that shall be depending at the time of her majesty's demise, or of any of her heirs or successors, shall be discontinued or put without day, by reason of their deaths and demises.

32. S. 5. By the demise of her majesty, or any king or queen of this realm, no commission of assize, oyer and terminer, general gaol delivery, or of association, writ of admittance, writ of si non omnes, writ of assistance, or commission of the peace, shall be determined, but shall continue for 6 months, unless superseded by the successor; and no original writ, writ of nisi prius, commission, or proceedings, in or issuing out of any court of equity, nor any process upon any inquisition, nor any certiorari or habeas corpus, nor any writ of attachment or process for contempt, nor any commission of delegacy or review for any matters ecclesiastical, testamentary, or maritime, or any process thereupon, shall be discontinued by the demise of her majesty, or any king or queen.

33. The king was sole plaintiff in a writ of error in the house of lords, and died; and the opinion of the lords and of all the judges, who attended on that occasion, was, that the writ abated by his death. Gibb. 35, 36. Pasch. 1 Geo. 2. The King v. A. Bishop of Ardmagh and Whaley.

34. The

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34. The lord chief justice's warrant for apprehending a person is void by the king's demise, and the constable imprisoning the person by force thereof, is liable to an action. Gibb. 80. Trin. 2 and 3 Geo. 2. Anon. Coram Eyre Ch. J. at nisi prius in Middlesex.

(H) By Alteration or not coming of the Justices.

1. *ASSISE* is taken in B. R. in Suffolk, and pending the assise the Bank is removed to Westminster, yet the assise is not discontinued, notwithstanding the statute says, quod assise capiantur in suis comitatibus; for this shall proceed and shall be tried in Suffolk by nisi prius. Br. Discontinuance, pl. 51. cites 19 Aff. 5.

2. Assise in B. R. of land in the county where the Bank is, and pending the assise the Bank is removed into another county; it is not denied but that by this the assise is discontinued. Br. Discontinuance de Process, pl. 29. cites 25 Aff. 5.

3. Assise and verdict for the plaintiff, and the parol was put without day by removal of the justices, the plaintiff may remove the record before the new justices to have re-attachment, and upon this to have judgment; and so see that the parol may be without day as well after verdict as before; for the record is not determined till judgment. Br. Jours, pl. 69. cites 26 Aff. 20.

4. Note, per all the justices, that by not coming of the justices in assise, or by death of the king, no writ is discontinued, but the parol put without day, and may be received by re-attachment or resummons; and note, that when the justices are changed, all the old assises are without day by the not coming of the old justices; for the new ones cannot proceed by the assignment of the day made by their predecessor. Br. Discontinuance de Process, pl. 2. cites 9 H. 6. 40.

[492] 5. 11 H. 6. cap. 6. Suits and process before justices of peace shall not be discontinued by new commissions of the peace, but the justices in the new commissions shall have power to continue the said pleas and processes.

Br. Corone, pl. 200. cites S. C. — Br. Office and Officer, pl. 25. cites S. C. — D. 165. a. pl. 2. Mich. 1 Eliz. S. P. resolved by the justices, chief baron, attorney and solicitor, upon the statute 1 E. 6. cap. 7.

6. Nota, that by demise of the king, all commissions and patents to officers, judges, &c. cease. Contra of * office of coroner, for he is made judicially by writ and not patent. Br. Commissions, pl. 19. cites 4 E. 4. 44.

7. Recognizance of mainprize that a man shall answer in account, this recognizance is determined by demise of the king; for it is ad respondend' coram justic' nostris, and this is taken by the justices of the old king, and the same of recognizance of the peace ad conservand' pacem nostram, which is the peace of that king who is then living; per Cur. Br. Commissions, pl. 21. cites 1 E. 5. 1.

8. Before

8. *Before the statute of 1 E. 6. cap. 7. if the justices of assise had died before issue in assise, all the pleading was lost and the parties must plead de novo; and if after issue they had died, &c. yet all should stand in force. Thel. Dig. 184. lib. 12. cap. 8. pl. 2. cites Hill. 4 H. 7. 8.*

9. *1 E. 6. cap. 7. s. 6. No process or suit before justices of assise, gaol-delivery, oyer and terminer, justices of the peace or other the king's commissioners, shall be discontinued by the making any new commission or association, or by altering of the names of the justices, but the new justices and commissioners may proceed as if the old commissions had remained.*

10. *An assise was arraigned before justices of assise, and adjourned to the second Saturday of Mich. term to Serjeants-Inn, and day being then given to answer, the term was kept at Hartford, and day given to the second Saturday of Hill. term. It was held clearly, that the assise was discontinued by not coming of the justices the 1st day; and there must be a re-fummons against the jurors and a new attachment against the defendant, and he must begin de novo to arraign his assise. Cro. E. 12. pl. 1. Hill. 25 Eliz. C. B. Foliamb's case.*

11. *The 1 E. cap. 7. helps the non venire of the justices as to a discontinuance. Jenk. 228. in pl. 95.*

12. *Error was brought in the Exchequer-chamber of a judgment in B. R. in debt for rent, which (and all other writs of error depending there) were discontinued by the not coming of the justices, the term being adjourned propter pestilentiam in London; and the adjournment did not extend unto them. Now a new writ of error, quod coram vobis residet was brought, and for as much as this writ was brought after the stat. of 3 Jac. to stay execution in debt, it was prayed that according to the said statute he might have execution, or that the party should put in sureties to pay the condemnation; but upon consideration of the statute all the justices held that it was out of the statute, because it is not an original writ of error, but it is in lieu of a former writ, upon which the record was removed before the statute, and it being discontinued not through default of the party, it is not reason he should be prejudiced thereby; wherefore it was resolved that this case was out of the statute 3 Jac. cap. 8. Cro. J. 135. pl. 8. Mich. 4 Jac. B. R. Bostock v. Snell.*

13. *S. and A. were indicted of perjury committed in their evidence given upon an indictment of barretry against N. (the record of which was recited in this judgment, and therein it appeared that the venire was made returnable coram J. S. & J. N. justiciariis predictis, and at a day certain) and judgment given, and error brought, and assigned that the venire being returnable coram justiciariis predictis, none but the same justices could proceed, and not those who sat the next assises by virtue of a new commission; and therefore the proceeding before them were coram non iudice, and so no perjury could be committed. Sed non allocatur; for the statute of 1 & 2 E. 6. enables new commissioners of oyer and terminer to proceed where the former left off, before whom the matter commenced. Vent. 181. Hill. 23 & 24 Car. 2. B. R. The King v. Serjeant and Annis.*

14. Where

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14. Where an *aet of parliament* aids the *discontinuance of the term*, yet when the term is *continued* by the statute, the party ought to *enter up his continuances*; and for default of it his action is discontinued, per Cur. Skin. 571, 572. pl. 15. Mich. 6 W. & M. in B. R. in case of Brook v. Ellis.

15. If after *justices* have sat by virtue of a commission, and *taken divers indictments, and awarded process thereon*, they or *some of them* shall *die*, the king may grant a new commission to those who are living only, or to others commanding them to continue the proceedings begun, and to proceed upon such process, and to hear and determine all the offences in the former commission; and thereupon the king shall send a writ unto the executors of the justices who are dead to send the rolls, records, and processes touching the premises, before the new commissioners, &c, 2 Hawk. Pl. C. 19. cap. 5. s. 16.

(I) Pleadings after the last Continuance.

What may be pleaded after the last Continuance.

1. **A** Man may plead a plea after the last continuance, *after issue joined, and in another term*, and therefore it seems that the parties have day in court as well after issue joined till verdict as before; but a man shall not have plea after the last continuance *mesne between the nisi prius and the day in Bank*, as it is said elsewhere, *nor at the day of nisi prius*, nor be received by default of the baron, or tenant for life at the day in Bank after verdict of nisi prius. Br. Continuance, &c. pl. 77, cites 7 E. 3. Fitzh. tit. Inquest, 46.

If the plaintiff release the defendant after the award of the nisi prius, if the jury

2. *But if nisi prius remains for default of jurors*, he shall plead a plea after which happens after the last continuance; but contra after verdict, arguendo by Newton 22 H. 6. Fitzh. tit. Resceipt, 63. & Ibid. tit. Continuance, 15. Br. Continuance, &c. pl. 77. cites 16 E. 4. 5. & 50 E. 3. 4.

remains propter defectum, the defendant may plead it at the day in Bank, because the cause was not determined by the jury, and therefore he is at liberty to plead it at any other day of continuance, and it may be tried by the jury when they appear. Gilb. Hist. of C. B. 85.

3. In account the defendant shewed tally of the plaintiff of the receipt of parcel of the sum, and the plaintiff *waged his law that it was not his tally, and had day to perform it*, and at the day the defendant came and *pleaded the release of the plaintiff of all actions after the last continuance*, and he was received so to do, and the plaintiff compelled to answer; but after this the defendant shall not have any other new plea after the last continuance at any other day; quod nota. Br. Continuance, pl. 21, cites 21 E. 3. 49.

4. If parties are at issue, and the demandant *releases to the tenant*, and afterwards he takes continuance by *prece partium*, he shall not plead the release. Br. Continuance, pl. 17. cites 14 H. 4. 12. by Persay and Hammond. Brooke says & sic vide that a man may plead plea after the last continuance, after issue.

5. A man may plead as many pleas by matter of record, after the last continuance as he please; but upon matter of fact a man shall have but one plea only after the last continuance; per Rolfe; but by Chaunter clear, a man shall not have more than one plea after the last continuance, be it by matter of record or matter en fait; quod Cheyney J. concessit. Br. Continuance, pl. 5. cites 9 H. 6. 23.

6. At nisi prius a man may plead release and the like after the last continuance. Br. Continuance, &c. pl. 53. cites 10 H. 6. 9. Fitzh. tit. Enquest, 143.

7. In cosinage the parties were at issue, and at the day the jury appeared, and the tenant pleaded the release of the plaintiff after the last continuance. Br. Continuance, &c. pl. 55. cites 10 H. 6. 9. & Fitzh. tit. Judgment, 13.

8. In forger of false deeds against several, they were at issue, and process continued against the inquest till the jury appeared, at which day the defendant pleaded arbitrament after the last continuance, and thereupon the inquest was discharged. Br. Continuance, pl. 25. cites 19 H. 6. 36.

9. A. brought replevin against B. who avowed on the plaintiff, &c. for *rev-erence* in jure of the plaintiff's wife, whereupon A. prayed aid of his feme and had it, and after issue at the distringas juratores returned the plaintiff sedit, that after the last continuance his feme was dead; sed non allocatur, inasmuch as she was no party to the original, and if the avowry had been upon a stranger, and the plaintiff had pleaded hors de son fee, and the avowant had died pending the issue, &c. yet the issue should stand. Br. Continuance, &c. pl. 28. cites 21 H. 6. 23.

10. A feme was received to plead that her baron died after the last continuance, and issue taken, that he did not die after the last continuance; and it was said that if he died before, she should not be admitted to plead as party, but as amicus curie. Thel. Dig. 205. lib. 14. cap. 3. f. 9. cites Mich. 38 H. 5. 9. Quære.

11. In debt, per Moyle, the defendant after issue may once plead a plea after the last continuance, as release and the like, but not oftener than once, for then it would be infinite, and so mischievous. Br. Continuance, &c. pl. 41. cites 38 H. 6. 33.

Br. Ibid. in
pl. 59. cites
16 H. 7.
11. S. P.

12. In detinue after garnishment prayed by the defendant, and the scire facias awarded, he shall not plead that the plaintiff was outlawed after the last continuance. Thel. Dig. 208. lib. 14. cap. 9. f. 1. cites Trin. 11 E. 4. 14.

13. It is said by Littleton that a man shall not plead after the last continuance, unless where a plea is pleaded before, for if there be only an imparlance before, it suffices to shew the day certain when the thing was done, which shall abate the writ. Thel. Dig. 225. lib. 14. cap. 3. f. 10. Mich. 15 E. 4. 5.

14. In assise the tenant pleaded as to 10 acres that C. was attainted of treason, and that it was found by office virtute brevis that he was thereof seised in fee at the time of the attainder, and the assise awarded of the rest, which remained pro defectu juratorum, and at the day the tenant said that it was found by quæ plura that C. was seised of
more

* This in
the largest
folio edition
is (agreed)
and so mis-
printed.—

† All the editions cite 4 H. 7. 8. but seem misprinted, there being no such point there; but it seems it should be 9 H. 7. 8. b. &c. pl. 5. & 16 H. 7. 11. b. &c. pl. 5. the case of Burnley v. Halewell.— Br. Aid del Roy, pl. 99. cites S. C. but not S. P. § [495]

more land specified in the assise at the time of the attainder, and demanded judgment si rege inconsulto; and ~~and~~ *examination of the escheator, the assise was adjourned to W. and afterwards into C. B. and at the day the tenant said that it was found before the same escheator virtute officii the same day that the que plura was found, that C. was seised of the land in the assise the day of the attainder, whereupon pending the assise, and before the day of adjournment in C. B. the escheator seised it into the hands of the king and demanded judgment if rege inconsulto, and the plaintiff demurred; per Brudenel and Keble, the tenant shall not have the plea, for he shall have no more than one plea after the last continuance and he shall have one plea after the continuance before, and shall not have another plea after the continuance again, as that one of the plaintiffs was dead or outlawed, nor other plea unless there be in the same court a record to ground it upon; quod Keble concessit, and that he shall not plead a release made after, nor shall he plead entry after, nor any other matter but what appears to the justices before them of record. Br. Continuance, &c. pl. 45. cites † 4 H. 7. 8.*

15. *But in trespass, if one pleads release, and the other pleads arbitrement, and afterwards he who pleaded the release pleads another release after the last continuance, he shall have it, because this is the first plea pleaded after the last continuance, but if the arbitrement be found afterwards against the plaintiff, he shall have advantage thereof; because in trespass arbitrement is satisfaction, and satisfaction of one will excuse all. Br. Continuance, &c. pl. 45. cites * 4 H. 7. 8.*

16. And the same law of *certificite of bastardy* for the one tenant, the other who pleads a plea after the last continuance shall have advantage thereof, because it appears of record before the same justices. Br. Continuance, &c. pl. 45. cites * 4 H. 7. 8.

17. And the same law of *the verdict of the arbitrement*, and he shall not have plea after plea as above in any other case. Some held that the plea should be suffered for the king's advantage, but non adjudicatur. Br. Continuance, &c. pl. 45. cites * 4 H. 7. 8.

18. It was agreed arguendo, that a man shall not have but one plea after the last continuance, unless such pleas as were not in esse at the time of the first plea; for then it is not after the last continuance. Br. Continuance, &c. pl. 82. cites 9 H. 7. 8.

19. After plea in bar pleaded, a man shall not have but one plea after the last continuance, if it be not a thing which is apparent to the justices, or which is in advantage of the king, &c. Thel. Dig. 204. lib. 14. cap. 3. f. 12. cites Mich. 9 H. 7. 9. 16 H. 7. 11. & 1 E. 4. 4.

20. Where a prior brings an action, and pending the action he is deposed, the defendant ought to plead it immediately, and so of outlawry and release, and yet these go in bar, but if he does not plead it immediately, he shall not have them after the last continuance, ut patet per Vavasor & Curiam. Br. Continuance, &c. in pl. 79. cites 16 H. 7. 17.

* See the 2d note at pl. 14. that the year seems to be misprinted.

21. If *inquest* be taken by default, the defendant cannot plead a plea after the last continuance before judgment; for he has not day in court; but is put to his writ of audita querela, unless in the case of the king; quod nota. Br. Jours, pl. 74. cites 21 H. 7. 83.

22. It seems that after *inquest* awarded to inquire of damages in action of trespass or the like, the defendant cannot plead any plea after the last continuance, because he had no day in court. Br. Continuance, &c. pl. 61.

Br. Continuance, &c. pl. 84. cites 1 H. 7. 21. S. P. accordingly.—

If the plaintiff, after a writ of inquiry awarded, release the defendant, he cannot plead this release at the day in Bank, because there is no day given him, and judgment is already given. Gilb. Hist. of C. B. 85, 86.

23. No more than one plea after the last continuance can be received, to avoid infinity. Jenk. 160. in pl. 2.

24. There are 2 cases wherein a man may plead, though it be after the last continuance, viz. *outlawry*, and the *death of the plaintiff*; as to the outlawry, it is upon the prerogative, that the debt itself is forfeited to the king, and by virtue of the prerogative * nullum tempus † occurrit regi; and therefore he may plead it though a continuance has happened after the outlawry; so he may plead the death of the plaintiff, because though a continuance has been entered, yet that continuance is a nullity, because there was no plaintiff in being when day could be given, so it may be pleaded if the plaintiff died after the day at nisi prius and before the day in Bank; and the reason is, that if there is no cause in court, no judgment can be given for a person that is not rerum natura, and if it be given it is erroneous; and if the plaintiff's attorney will traverse that plea, he cannot say the plaintiff comes per attorn', because that would be to forejudge the matter in issue, but the attorney by his name, viz. I. S. venit pro magistro suo & dicit. Gilb. Hist. of C. B. 83, 84.

* Gilb. Hist. of C. B. 85. says that some have held that an outlawry may be pleaded after the last continuance, because nullum tempus occurrit regi; but says, quære whether the subject shall after plea of darrrein continuance partake of the prerogative, or therefore re-

jected. — † Gilb. Hist. of C. B. 86. S. P. but now by the statute 8 W. 3. cap. 10. the executors, &c. may have a scire facias on such an interlocutory judgment.

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25. In debt upon an obligation, the parties were at issue upon tender at the day, and afterwards the defendant pleaded, that after the darrain continuance, the money was attached in his hands in London, at the suit of I. S. The Court doubted if monies might be attached in London, a suit for it being depending in this court, but (if attachable) they held it might be well pleaded after the last continuance, for it goes in bar at another day. Cro. E. 101. pl. 7. Trin. 30 Eliz. B. R. Pell v. Pell.

26. In debt against an administrator, after demurrer joined the administration was repealed, and granted to another; the defendant would have pleaded this matter after the last continuance, but it was resolved that he could not plead it after the demurrer, though after issue joined he might. Mo. 871. pl. 1210. Stoner v. Gibbons.

Hob. 81. Hill. 13 Jac. STONER v. GIBSON. S. C. contra that he may plead a plea puis darrrein continuance,

and agreed also, that if defendant or plaintiff take issue or demur upon this plea, yet the Court must consider of the first demurrer also; for if, upon that standing confessed by demurrer, the plaintiff could not have

have his action, the Court cannot give judgment for him, howsoever the latter issue or demurrer pleads; but otherwise if the first had been an issue, for then nothing had been confessed to his prejudice, and then that had been utterly relinquished by a 2d issue or demurrer.——S. C. cited per Cur. Trin. 24 Car. B. R. because after issue joined no respondeas ouster can be awarded; and says that with this agrees l. 5. 24. 139. when in debt after issue joined, the defendant at the nisi prius pleaded payment of part after the last continuance in abatement, and the jury being discharged, and the plea adjourned into Bank, the plaintiff had judgment to recover his debt, because no place of payment was pleaded. Allen; 66: in case of Beaton v. Forrest.

27. *Ejectione firmae*, after verdict at the nisi prius for the plaintiff, the defendant at the day in Bank pleaded a release from the plaintiff, betwixt the verdict and the day in Bank, and shews it to the Court; and whether he should be received thereto, was the question; and resolved that he had not any day to plead it, nor had he any remedy but by *audita querela*, if the plaintiff sued execution; wherefore it was adjudged for the plaintiff. Cro. J. 646. pl. 10. Mich. 20 Jac. B. R. Stamp v. Parker.

A plea after the last continuance waives the former plea; 28. Pleading the plea puis darrein continuance, is a relinquishing the former plea to which a demurrer was, contrary to Hob. 81. 12 Mod. 539. Trin. 13 W. 3. in the case of Barber v. Palmer. for now the party relies upon this last plea, and it is a tacit waiver of the former plea, but not of a demurrer joined, for that lies in the power of the Court, and not of the parties. Jenk. 160. in pl. 2.

[497] (K) Pleas after the last Continuance. Proceedings and Pleadings, how to be in such Cases in general.

S. C. cited by Yelverton J. Yelv. 181. S. C. cited Bulst. 92. 1. *AT the nisi prius in plea of land, the tenant pleaded a release after the last continuance, sed non allocatur; for this is not day to plead, and therefore the inquest was taken. Br. Inquest, pl. 102. cites 7 E. 3. 37.*

———*Actio non* was pleaded after the last continuance, and set forth for cause that he had released the defendant all actions and demands; per Williams J. this a good plea, to which the whole Court agreed. Bulst. 205. Pasch. 10 Jac. Anon.

2. And at the day in Bank, he would have pleaded the release; sed non allocatur, but seisin of the land awarded. Ibid.

3. But on the day of return of the venire facias, the plaintiff may plead after the last continuance, and at all other days after and before the nisi prius. Ibid.

4. In quare impedit by R. H. the defendant said that the plaintiff was made knight at D. after the last continuance, to which the plaintiff said that he was made knight at D. such a day before the continuance, absque hoc that he was made knight after the last continuance, prist, and the other e contra, and it was admitted a good issue and found against the plaintiff, and the writ abated. Br. Negativa, &c. pl. 14. cites 7 H. 6. 14.

5. And it was agreed there that not the deed of the plaintiff after the last continuance is a good plea. Ibid.

6. False imprisonment by 3, the defendant said that one of the parties died after the last continuance, judgment of writ, and the plaintiff said that he did not die after the last continuance, and per

June Ch. J. it is a negative pregnant. Br. Negative, &c. pl. 30. cites 14 H. 6. 9.

7. So in *formedon*, to say that *ne dona pas in the tail*, but shall say *ne dona pas modo & forma*. Ibid.

8. And per tot. Cur. where the one alleges death, it suffices for the other to say *prist*, that not, and this is perfect issue, and after the issue was that *he did not die modo & forma*, quære therefore; for it seems that the issue is good there, but it seems if the party will say that *he did not die after the last continuance*, it is negative pregnant. Ibid.

9. In præcipe quod reddat they were at issue, and the tenant pleaded * release of the demandant, after the last continuance; the demandant said that not his deed after the last continuance, and no plea, for it is pregnant, by which he said that he made it before, absque hoc that he made it after, and no plea, but confession of the action, by which he said that he made it before by duress, &c. absque hoc that he made it after the last continuance, and then well. Br. Traverse, per, &c. pl. 366. cites 21 H. 6. 9.

pl. 26. cites S. C.

* S. P. Br. Negativa, &c. pl. 38. cites 5 H. 7. 7.

Br. Negativa, &c. pl. 18. cites S. C. per Newton Ch. J. and Hutton J. but vide J. dubitavit. — Br. Continuance,

10. In false imprisonment by two, the defendant alleged the death of one after the last continuance, judgment of the writ; the plaintiff said that he did not die after the last continuance. This is a negative pregnant, whereupon he said that he did not die modo & forma, and the issue was accepted. Br. Continuance, pl. 35. cites 36 H. 6. pl. 24.

11. In cui in vita the tenant after the view pleaded that the demandant had entered after the last continuance, and the other e contra, and so to issue, which was fine die by the demise of the king. The demandant afterwards brought re-summons, and the tenant pleaded that after the last continuance the plaintiff brought assise against him of 2 acres in D. and pleaded all in certain, and how the demandant recovered and entered, and that the 2 acres are parcel of the land in demand, judgment of all the writ, and by the demand he shall have but one plea only after the last continuance, whereas now he has taken two. Moyle J. held that in this case he might; for where a plea is fully continued, he shall not plead but one false plea after the last continuance; but here as to the first plea pleaded after the last continuance, the plea was fine die, and so in effect determined, and upon the re-summons, he shall plead de novo, and therefore in the re-summons he shall have plea once after the last continuance. Quære; for afterwards they went to another matter, and so the case was not ruled in this point. Br. Continuance, &c. pl. 46. cites 1 E. 4. 3. & 2 E. 4. 10.

may plead other matter that is consistent with it, &c. — S. C. cited Arg. All. 66. Trin. 24 Car. B. R.

12. In debt, after issue joined, the defendant at the nisi prius pleaded payment of part after the last continuance in abatement, and the jury being discharged, and the plea adjourned into Bank, for that no place of payment was pleaded, the plaintiff had judgment to recover his debt. Arg. All. 66. Trin. 24 Car. B. R. cites Long, 5 E. 4. 139.

writ to abate it, this may be pleaded post darreign continuance, though there is a plea in bar; for this

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E. & attachment, pl. 21. cites S. C. & S. P. by Moyle, but Choke J. e contra, and that he shall plead no plea which is contrariant to the plea he pleaded before; for if he had pleaded before, he cannot now plead in bar, nor things different to nor variant from his first plea, but

The pleas are twofold, viz. in abatement, and in bar; if they plead in bar,

pleading the

can only waive all pleas in abatement that were in being at the time of the bar pleaded, but not subsequent matter; but though it be pleaded in abatement, yet after a bar is pleaded it is peremptory, as well on demurrer as on a trial, because after bar pleaded he has answered in chief, and therefore can never have judgment to answer over. Gilb. Hist. of C. B. 84. — So it may be pleaded in bar, but whether it be pleaded in abatement or in bar, in the first place it must be pleaded *quod brevis cassatur*, and the other *quod actionem ulterius manutenere non debet*, and not that the former inquest should not be taken; because it is a substantive bar in itself, and comes in the place of the former, and therefore must be pleaded to the action. Gilb. Hist. of C. B. 84, 85.

13. In *assise* he that pleads the *death of one of the plaintiffs*, pending the assise and after the last continuance, ought to *show that the assise was continued from such a day to such a day, and that after this day he died*; quod nota, per Curiam. Br. Continuance, &c. pl. 49. cites 18 E. 4. 13.

Br. Brief,
pl. 2. cites
S. C.

14. If tenant enters pending *præcipe quod reddat* and before issue, the entry shall be that he entered pending the writ; but if it was after issue, it shall be that he entered after the last continuance; per Jennor prothonotary; note the diversity. Br. Continuance, pl. 2. cites 26 H. 8. 3.

S. C. cited
in Lutw.
1143. by
the reporter
in his ob-
servations on
the case of
Campion v.
Baker, and
adds another
note, that in
some preced-
ents of
pleas after

15. In *trespass*, upon not guilty pleaded, the jury appeared the first day of Hill. term, the defendant said that the inquest ought not to be taken, for the plaintiff had released to the defendant all actions after the last continuance, but because the release was after the *effoin day of octub. Hill.* it was disallowed, and the inquest taken; contra if the release had been made before the *effoin day*; for in such case he might plead it whether the jury appeared or not, because he had no day to plead it before; but then also he shall say *actio non*, and not that the inquest shall not be taken. D. 361. a. pl. 10. Hill. 20 Eliz. Anon.

the last continuance, it is pleaded *quod quer' actionem suam prædictam ulterius manutenere seu ulterius habere non debet*, and cites Raft. Appeals in Mort. 4. Dett. en Release, 7. tit. Attaint en Barr, 2. and says that this seems to be a proper way of pleading a collateral thing which happened after the action was pending; for he thereby admits that the action was well brought, but that the plaintiff, by reason of this new matter, ought not to proceed further in it.

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16. Action for words, at nisi prius the defendant pleaded *concord after the last continuance, judic' si al enquest*, &c. and per Cur. it is no plea, but he ought to have concluded *judgment si actio*, and so in all pleas pleaded since the last continuance; and upon this judgment was given per quer' and no nisi prius granted, for it was a confession of the matter in issue. Cro. E. 49. pl. 4. Trin. 28 Eliz. B. R. Cockain v. Witnam.

S. P. and
resolved that
defendant
could not
plead this
matter after
a demurrer,
but other-
wise after
issue joined.

17. In debt by one as administrator, the defendant at the nisi prius pleaded that the plaintiff's letters of administration were revoked after the last continuance, *judgment si ad captionem procedere debeat*; and good by Walmsley and Gawdy, but Anderson and Beaumont contra. Quære. D. 361. a. Marg. pl. 10. cites Trin. 36 Eliz. C. B. Hutton v. Paramour.

Mo. 871. pl. 1210. Trin. 12 Jac. Stoner v. Gibbons. — Hob. 81. pl. 106. Stoner v. Gibson, S. C. agreed that upon adjournments and continuances of demurrers, the plaintiff might be nonsuit at the day in another term whereunto it was adjourned, and by the same reason he may plead a plea after the last continuance.

S. C. cited
Arg. 5 Mod.
12. —

18. In pleading a thing after the last continuance, it is no good pleading to say, *quod post ultimam continuationem such a thing happened*,

happened, but he *must allege precisely the very day*, viz: from such a day to such a day; per Cur. Yelv. 141. Mich. 6 Jac. B. R. in case of Ewer v. Moyle.

He that pleads a plea in abatement, or after the last

continuance, must plead certainly, and this is to be observed as a principle in law; per Mountague Ch. J. Pl. Com. 33. b. Pasch. 4 E. 6.

19. Such a plea can *not be taken at nisi prius*, the power of the justices of nisi prius being only to take the verdict of the jury: Bullst. 92. Mich. 8 Jac. Moor v. Browne.

A plea after the last continuance is pleaded at the nisi prius

on the day of the nisi prius, it is in the discretion of the justices whether to receive it or refuse it. Jenk. 159. in pl. 2. — Cro. J. 261. pl. 24. Mich. 8 Jac. B. R. Hawkins v. Moor. S. P. and seems to be S. C. — Yelv. 180, 181. Moor v. Hawkins: S. C. accordingly. — Brownl. 1436 S. C. but seems only a translation of Yelv. — Lane, 81. Brown's case. S. C. accordingly.

20. And if there be any mistake in *such a plea* pleaded at the assises, it *cannot be amended after the commission of the judges is determined*, neither by the judges themselves, nor by the Court into which the plea is returned with the nisi prius record, as it ought to be; and therefore where at the trial of an ejectment a plea was put in before the jurors were sworn, that since the last continuance, viz. such a day term Trin. before the day of assises (viz.) 20 July (the assises being the 22 July) the plaintiff had entered into such a close by name, parcel of the premises in the declaration specificat^d, which plea was received, and the next term it was moved that this plea might be amended in adding the vill, where the close lay, and the Court would not: Yelv. 180, 181: Mich. 8 Jac. B. R. Moor v. Hawkins.

Bullst. 92. Moor v. Brown, S. C. & S. P. accordingly. — Cro. J. 261. pl. 24. Hawkins v. Moor, S. C. accordingly.

21. If a man *pleads an insufficient plea after the last continuance*, there the *plaintiff shall have judgment*, as if the first issue had been tried for him; and for this he cited the New Book of Entries, fol. 575. Win. 90, Trin. — 22 Jac. C. B. Per Hutton J. said it was adjudged in Sir Hen. Brown's case.

22. *Time and place for the venue* must be laid in this as in all pleas. Gilb. Hist. of C. B. 84.

23. A plea after the last continuance *may be thus*, viz: And now at this day, &c. comes such a one defendant by J. C. his counsel, and says, this action the plaintiff against the defendant ought not to maintain, for that after the quindena of the Holy Trinity last past, from which day until such a day in Mich. term next, unless the justices of assises before come such a day, &c. the action aforesaid is continued, &c. the plaintiff by his deed dated, &c. did release, &c. and shew the matter what it is, whether abatement in bar dilatory, or peremptory, as the case is, &c. and this he is ready to aver. Clayt. 155, 156.

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24. *Debt for rent*, the defendant pleads *nil debet*, and so issue joined, and at the day of nisi prius the defendant pleads quod puis darrein continuance, the plaintiff *released* to him, and doth *not name any place where* he released, so as no issue could be taken, and to this the plaintiff demurred; and it was adjudged a fault incurable. Freem. Rep. 112. pl. 132. Trin. 1673. Gardiner v. Blonam.

Freem. Rep.
252. pl. 267.

S. C. the
defendant
pleaded an
accord with-
out alleging
satisfaction,
whereupon
plaintiff de-
murred, and the plea being certified on the back of the plea, the plaintiff gave defendant a rule to join in demurrer, but defendant refusing, the plaintiff entered judgment, and took the defendant in execution.

The Court held, 1st, That defendant refusing to join, the plaintiff might lawfully enter up his judgment. 2dly, That he that offers a plea puis darrein continuance at the nisi prius, ought to prove it there; for unless he makes it appear to the judge that it is a true plea, it is in his discretion whether he will allow it or not, but may proceed to try the cause. 3dly, That if the plea be found against the pleader, it is peremptory. 4thly, That the plaintiff cannot reply to it before the judge of nisi prius. 5thly, That the plea could not be amended here, but it might, during the assizes, be amended before the judge of nisi prius.

* Yelv. 181. Mich. 8 Jac. B. R. in case of Moore v. Hawkins, S. P. held by all the justices of Serjeant's-inn, in Fleet-street, accordingly. — Cro. J. 261. pl. 24. S. C. & S. P.

† But after their commission determined, the justices of assize have no power to amend the plea. Yelv. 181. in S. C. — Cro. J. 261, pl. 24. S. C. & S. P.

26. In trespass against four defendants, who appeared, and after several continuances three of them pleaded the death of the fourth after the last continuance, & petunt judicium de brevi & quod breve illud cassetur. The plaintiff demurred. The plea was adjudged ill in the conclusion, which ought to be petit judicium, si Curia ulterius procedere vult; because in fact the writ was abated before by the death of the party; whereupon a respondeas ouster was awarded. 3 Lev. 120. Trin. 35 Car. 2. C. B. Hallows v. Lucy.

27. In debt upon a bond the statute of usury was pleaded, and a demurrer was to the plea, and the paper book made up and delivered, and the demurrer joined, with a blank left for the day of the Curia advisare vult. The defendant pleaded, that the plaintiff died after the last continuance, and thereupon the plaintiff's attorney filled up the blank, and made it diem Sabbati prox' post quinden' Pasche, so which day the judgment ought to refer, and if the plaintiff was then living, it would be good; and the attorney for the plaintiff was examined upon oath, whether he was then living or not? who swore that he saw him after the said Saturday; whereupon the plea was rejected. L. P. R. 328. cites 8 W. 3. B. R. Moore v. Row.

28. In debt on a bond, defendant pleads in bar as to part, that after the last continuance he had paid so much, which the plaintiff accepted; to which the plaintiff demurs, and it being a declaration of Michaelmas term, it was adjudged the whole was discontinued; for the plaintiff's way had been to demur to the plea, so far as [501] it was pleaded, as he had cause to do, it being after last continuance, and acquittance pleaded or produced, and take judgment by nil dicit as to the rest; per Cur. 12 Mod. 626. Hill. 13 W. 3. Crow v. Mason.

29. Debt upon a bond against two, the declaration is, memorandum quod alias scilicet de termino scilicet Mich. An imparlance is to die Mercur' prox' post octab' Hillar'. The 9th December the plaintiff released one of the defendants. At the day of pleading one of the defendants

defendants pleads this release with an *actio non*. The plaintiff demurs, and held to be the usual form of pleading with an *actio non*, though some of the pleadings be with an *ulterius non vult prosequi*, this is before issue is joined; for when the party has two matters to plead, he may take one, and then he waives the other; but after he has pleaded a plea, and issue is joined upon it, then he is proper to plead an *ulterius non vult prosequi*; and therefore in all pleas puis darrein continuance a time must be mentioned, that it may appear that the party had not an opportunity to plead this matter before. When a man hath a matter that will bar the plaintiff of his action, he may plead this at the first day; so if the matter will abate the plaintiff's writ. Parker Ch. J. said as to • Jenner's opinion, in 26 H. 8. 3. mentioned in Lutw. 1178. where a præcipe is brought, and the defendant enters, the tenant may plead that he entered pending the writ, (id est,) that he may plead this generally, without taking any notice of time, but when issue is joined in a cause, the Court hath nothing to do but to try the issue, and in the case here, it is not material when the lease was, because it is the same thing as if it had been before the action commenced. As to Littleton's opinion in Ed. 4. that was after issue joined, the law doth allow but one plea, and therefore when you have pleaded one, you cannot come in and plead another, but every plea ought to be pleaded in the first instance, and you can have but one plea puis darrein continuance to avoid delaying the plaintiff, and † 3 Keb. 397: was denied, and when a plea puis darrein continuance is pleaded, he must shew why he did not plead it before, and shew the time particularly, as Yely. 141. for when a man had pleaded before he had put himself upon that defence; but if a matter happen puis darrein continuance he must plead it, and the constant practice is to plead it ut supra, with an *actio non*; for where a man hath a bar to an action, why should he not plead it as such? Pasch. 9 Ann. B. R. Price v. Kendrick.

• See (L) pl. 17. in the notes there.

† See (L) pl. 16.

(L) Pleas after the last Continuance. Where the Matter pleaded must be expressly mentioned to have been done, or happened, after the last Continuance.

1. IF a man pleads the death of the defendant, pending the writ, he shall not plead it after the last continuance, because the writ is thereby abated in fact; but contra of a plea which proves the writ abateable only; as taking of baron and the like. Br. Continuance, &c. pl. 30. cites 18 E. 3. 19. Br. Bridg. pl. 379. (383.) S. C.
2. In trespass after issue, the defendant was received to plead that the plaintiff was outlawed of felony, without saying after the last continuance. Thel. Dig. 204. lib. 14. cap. 3. s. 1. cites Mich. 20 E. 3. Utlawry 10. and 32 H. 6. 27.
3. A feme received. shall not plead in abatement of the writ a thing happening after the receipt, without saying after the last continuance.

Continuance and Discontinuance.

continuance. Thel. Dig. 204. lib. 14. cap. 3. f. 2. cites Trin. 49 E. 3. 21.

4. After issue the tenant shall not *plead that the demandant has entered*, &c. without saying after the last continuance, and it is not sufficient to say that he entered after the pleading. Thel. Dig. 204. lib. 14. cap. 3. f. 3. cites Hill. 50 E. 3. 4. and 21 H. 6. 54. But says, that after continuance taken, such plea was admitted. Trin. † 2 H. 6. 13. by saying that he entered *pendente brevi*.

* Br. Continuance, sec. pl. 3. cites S. C.

5. *Entry*, pending the writ, *nor acquittance of debt, pending the writ*, is no plea, unless it be said that it was after the last continuance. Br. Continuance, pl. 16. cites 50 E. 3. 4.

6. It is said, that the tenant shall not plead the *death of one of the demandants who is severed in formedon*, without saying after the last continuance. Thel. Dig. 204. lib. 14. cap. 3. f. 4. cites Mich. 19 R. 2. Br. 925. *Quære*.

7. In *præcipe quod reddat* the tenant cannot plead *that the demandant is outlawed in a personal action*, without saying that it was after the last continuance. Thel. Dig. 204. lib. 14. cap. 3. f. 5. cites Mich. 14 H. 4. 15.

8. A man shall not plead *excommunication* unless after the last continuance. Thel. Dig. 204. lib. 14. cap. 3. f. 6. cites Pasch. 20 H. 6. 27. and 36 H. 6. 19.

9. *Feme received* may say that the demandant has entered *pending the writ*, without saying after the last continuance. But he who is party to the writ cannot, after any continuance, plead the death of one of the demandants, or of the tenants, or entry of the demandant, or that the demandant has taken baron, *without saying after the last continuance*. Thel. Dig. 205. lib. 14. cap. 3. f. 7. cites Trin. 21 H. 6. 54. and 32 H. 6. 12.

Br. Resceit, pl. 62. cites S. C. —
Fitch. Resceit, pl. 60. cites S. C.

10. *Præcipe quod reddat* against baron and feme, who make default at the nisi prius, and the feme prayed to be received at the day of the petit cape returned, and said that the demandant had entered into the land in demand pending the writ, and did not say after the last continuance [and well]; contrary if she and her baron had pleaded this plea without resceit; nor no other who remains party to the writ without resceit shall plead it, but shall say after the last continuance; but tenant by resceit may. The reason is, for that he is tenant *de novo*, and a new tenant, and the demandant shall count *de novo*, and all ancient pleas and matters are waived except the original, and therefore he shall plead it at large, and is not bound by any continuances before. Br. Continuance, &c. pl. 29. cites 21 H. 6. 48.

11. A man shall not say that the plaintiff is made a bishop pending the writ, or that the feme took baron pending the writ after a continuance, unless he pleads it after the last continuance; per opinionem Curie, quod nota; but contra of death, or to say that the feme was covert the day of the writ purchased; note the diversity; for this disproves the writ in fact, whereas the other does not disprove it but only in law. Br. Continuance, &c. pl. 57. cites 32 H. 6. 10.

12. A man ought to plead *that the bishop is translated to another bishoprick after the last continuance*, if it be not pleaded at the first appearance. But in writ by a feme, the defendant shall say *that she was covert of baron the day of the writ purchased*. Thel. Dig. 205. lib. 14. cap. 3. f. 8. cites 32 H. 6. 12.

13. In dower the tenant pleaded *that he himself disseised A. who re-entered the 10th day of October, &c.* Neale said that the tenant should say that he entered after the last continuance; but Littleton said that a man shall not plead after the last continuance unless where a plea was pleaded before, whereas here is nothing but an imparlance; but Brooke says, *tamen quere inde*, for it seems the imparlance is a perfect continuance; but he that comes at the first day and pleads entry pending * the writ, this cannot be pleaded after the last continuance. Br. Continuance, &c. pl. 31. cites 15 E. 4. 4.

Gilb. Hist. of C. B. 84. cites S. C. and says that a release as he conceives may be pleaded, though there has been an imparlance between; because there

is no continuance of a former plea pleaded, and by the *libertas loquendi* the defendant has time given him to plead what makes most for his advantage. — But if the writ be only *abateable*, as if the plaintiff be made a knight, or the plaintiff being *feme sole*, takes a husband, it must be pleaded after the last continuance; for otherwise he depends on his first plea, and waives the benefit of his new matter; but it cannot be pleaded between the day at nisi prius and the day in Bank; because there has been trial in the same cause before. Gilb. Hist. of C. B. 84. — But if the lessor of the plaintiff dies, this cannot be puis darrein continuance, because the right is supposed in the lessee. Ibid.

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14. In trespass the defendant pleaded not guilty, and so to issue, and day given till another term, and mesne between these, the plaintiff released to the defendant, &c. and at the day other continuance was taken, at which day the defendant said that the plaintiff by the deed bearing date before the last continuance, and primo deliberat to him after the last continuance released to him, &c. and the plaintiff said that the delivery was when it bore date, absque hoc that it was delivered after the last continuance; and per tot. Cur. the plaintiff shall be barred by confession of the release after the action brought, and after the trespass done; but per Cur. the plaintiff might have said that he did not deliver the deed after the last continuance without saying more. Br. Negativa, pl. 43. cites 16 E. 4. 5.

Traverse, per, &c. pl. 247. S. P.

15. In debt the defendant cannot say that the plaintiff has received parcel of the debt pending the writ, without saying after the last continuance. Thel. Dig. 205. lib. 14. cap. 3. f. 11. cites Trin. 5 H. 7. fol. ultimo.

16. In action on the case by 2 administrators for money lent, the defendant pleaded the release of one generally after imparlance by *actio non*, and did not plead it after the last continuance as he might, it being made since the action brought, and therefore the plaintiff demurred; the Court held that the plea should have been after the last continuance, and the not pleading so loses all the benefit of the release, and judgment for the plaintiff. 3 Keb. 397. pl. 99. Mich. 26 Car. 2. B. R. Alderfon and Dowly v. Miller.

S. C. cited Arg. 2 Lutw. 1177. See (K) Pl. 29.

17. In replevin against 4, the defendants confess the taking, but plead in bar that the plaintiff 6 Feb. 1 Will. had released 2 of them, without saying before the writ brought or pending the writ, or after the last continuance; the plaintiff replied, that he had declared against them

The reporter, Ibid. 1178. says, that it seems it may be collected by

the better authority of the books there cited [from the Year books] that if any thing happens pending the writ and before issue joined, which might be pleaded in bar of the action, or which proves that the writ is abated, and not abateable only

them in Mich. term, 1 Will. made & forma predicta, and that they imparled till Hill. term following, and so set forth continuances till Pasch. and Trin. terms, and demanded judgment if the defendants shall be admitted to plead this release after an imparlance; and upon demurrer it was insisted for the plaintiff, that by the imparlance the defendants had affirmed the action; and that if they would have any benefit of the release they should have pleaded, that it was made after the last continuance, which they could not do because it was made before; all which was admitted to be true; if it had been after issue joined, for there is no occasion of continuances before. The Court, viz. Powell and Rookby, on this first argument were of opinion that the plea was good, and gave judgment for the plaintiff, nisi, &c. But the case was argued again the same term, and in Mich. term, and ordered to be argued again, but no judgment is on the roll. 2 Lutw. 1174. Trin. 2 W. & M. in B. R. Rainbow v. Worrall.

thereby, it may be pleaded notwithstanding a continuance after the thing happened, and need not be pleaded that it was after the last continuance, &c. But then it seems by the opinion of * Jennor prothocotary of C. B. that in such cases the pleading ought to be, that such a thing happened pending the writ; for in the 26th H. 8. 3. he says that in præcipe quod reddat, if the demandant enters before they are at issue, and the tenant pleads this entry in abatement, he ought to say that the demandant entered pending the writ; but if they are at issue, and then the demandant enters, the tenant shall say that he entered after the last continuance, and not pending the writ; but says that the reporter makes a quære of it, and says that the 21 H. 6. is otherwise, but Serjeant Lutwich says, that upon search throughout the year of 21 H. 6. no such thing is to be found there, but rather the contrary; for in 21 H. 6. 43, 49, & 50. the same tenant by receipt pleaded the entry of the demandant pending the writ, and nothing more; and the plea upon debate was allowed to be good; and says that Brooke, in his abridgment of the same book, tit. Brief, pl. 2. approves the diversity there taken by Jennor, with a nota diversitatem. But says, that in the principal case here of Rainbow v. Worrall, it is not said that the release was made either before the writ purchased, or pending the writ, or after the last continuance.

* See (K) pl. 29.

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5 Mod. 11. Green v. Moor. S. C. ordered to go over to the next term, because it being a just action, the plaintiff may in the mean time reverse the outlawry, and then may plead after the last continuance.

18. Debt upon a judgment was brought in Trinity terms, the defendant imparled to Michaelmas term, and then pleaded in bar, that the plaintiff die Lunæ prox' post festum Sancti Martini was outlawed; and upon demurrer to this plea it was objected, that all matters which happen after the action brought, and which go in discharge thereof, ought to be pleaded puis darrein continuance; but adjudged, this is like a judgment confessed by an executor after an action brought which is never pleaded, puis darrein continuance, and in these cases the time of the outlawry and judgment appear in themselves. 1 Salk. 178. pl. 3. Mich. 6 W. & M. in B. R. Moor v. Green.

For more of Continuance and Discontinuance, in general, see Adjournment, Amendment, Appeal (N), Default, Error, Ejectment, Protection, and other proper titles.



Contract and Agreement.

(A) What is, and the Effect thereof.

1. A Contract is an agreement entered into by several persons, inducing an obligation by its own nature, and the obligations arising from contracts are divided and distinguished according as they are perfected, either by the sole consent of the contracters, or by the intervention or tradition of things, or lastly by word or writing, and are either *ex re*, from a thing done; *ex verbis*, from words; *ex literis*, from writing; *ex consensu*, from consent. But as all obligations cannot be bound up under general and regular names of contracts, the law allows some obligations to pass under the name of *quasi contractus*, because they have some resemblance, and are of the nature of contracts.

2. If A. sells a horse to B. for 10l. and has no horse, yet A. shall have an action of debt for it; but if A. has a horse, B. may take it, and so it may be a perfect contract, and yet there is *not quid pro qua*. Br. Contracts, pl. 17. cites 37 H. 6. 8.

3. Lease for years rendering rent is a contract. Br. Contract, pl. 43. Br. Joinder, pl. 90. cites it as admitted. 7 H. 7. 4.

4. An agreement concerning personal things is a mutual assent of the parties, and ought to be perfect, full and complete; for when it concerns personal things it is the mutual consent of the parties, and ought to be executed with a recompence, or else to be so certain as to give an action or other remedy for a recompence, otherwise it is a naked communication without effect. Pl. C. 5. a. Hill. 4 E. 6. in case of Reniger v. Fogassa. Ibid. 11. b. Arg. S. P.

5. Recital of * *whereas he was possessed of certain land, he assigned the same, &c. amounts to an agreement.* Le. 122. pl. 164. Trin. 30 Eliz. B. R. Severn v. Clark. * S. P. decreed. 2 Mod. 86. &c. Pasch. 28 Car. 2.

Canc. Hollis v. Carr. — So exception in a lease amounts to an agreement. Le. 117. pl. 152. Trin. 39 Eliz. B. R. Arg. in case of Cage v. Paxton.

6. If one have wares purposing to sell them, and another desiring to buy them faith unto him, *do not sell them away, but tarry till such a day and I will pay you then for them*; this is a good promise and consideration, for by this he is hindered in the interim from the sale of them. Per Doderidge J. 3 Bull. 70. Trin. 13 Jac. B. R. in case of Copper v. Dickenson.

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7. If I say the price of a cow is 4 l. and you say you will give me 4 l. and do not pay me presently, you may not have her afterwards except I will, for it is no contract; but if you go presently to telling your money, if I sell her to another you shall have your action of the case against me. Noy's Max. 87.

8. A forced agreement of the party is accounted to be *no agreement*, and therefore the Court will not compel him that did thus agree to perform his agreement (22 Car. 1. B. R.); for the law abhors all force and violence. L. P. R. 48.

9. Agreement of parties *cannot prevent* a court of equity of its jurisdiction; as in case of a mortgage, it cannot be agreed that this Court shall not give relief. Arg. Chan. Cases, 141. Mich. 21 Car. 2. in the case of Fry v. Porter.

10. *Delivery in consideration of being paid the value*, is a sale. 1 Salk. 25. pl. 11. Trin. 2 Annæ, B. R. in the case of Herbert v. Borstow.

11. If two men submit to the award of a third person, they two do also thereby promise expressly to abide by their determination, for agreeing to refer is a promise in itself. 6 Mod. 35. per Holt Ch. J. Mich. 2 Annæ, B. R. in case of Squire v. Grevell.

See tit.
Deaf, Dumb,
and Blind.

(B) Good or not in respect of the Contractor.

See tit. En-
fant.

But in what
cases the
husband
shall be liable.

1. THE contract of an *infant* is void. Br. Contract, pl. 34. cites 39 E. 3.

2. So the contract of a *feme covert* is void. Br. Contract, pl. 34. cites 19 H. 6. 9.

See tit. Baron and Feme (E. 2) (E. 2. 4) — And see tit. Feme sole Merchant.

3. Agreement made *with an infant* is not binding, because ex parte, and remedies not mutual. MS. Tab. Jan. 19. 1710. Conway v. Shrimpton.

[506] (C) Good or not, in respect of the Contract, and the Manner of it.

1. PAROL or *promise to pay 10 l. without quid pro quo*, does not make a contract; for it is only nudum pactum unde non oritur actio. Br. Contract, pl. 34. cites 9 H. 5. 14.

2. Note, that a contract may *commence by condition*. Br. Contract, pl. 7. cites 33 H. 6. 43.

3. As if there is a bargain between two, that if one shall deliver twenty cloths to another, that then he shall pay to him 20 l. Ibid.

Winch. 85.
Trin.
22 Jac. C. B.
Arg. cites
S. C.

4. In trespass, the defendant said, that a bargain was had between them at D. that the defendant should go to S. and see the corn of the plaintiff, and if he liked it upon the view, and would give to the plaintiff 40 pence for every acre, that he should have it, by which he went and viewed the land, and was pleased with it, and took it,

it, which is the same trespass; and per Littleton, Choke, and Brian, justices, it is no plea, because he *did not shew that he had paid*; but *contra* if a day of payment had been agreed; for if a man cheapens wares at a price certain, and the vendor agrees to the price, this is no bargain, nor shall he take the wares if he does not first pay, or has a day of payment given; and as to the notice to be given to the vendor here, Brooke says it seems to him, that when he took the corn it is notice in itself that he was pleased with the corn. Br. Contract, pl. 25. cites 17 E. 4. 1.

5. If a man *sells* stuff for 40 l. *and delivers* the stuff, *and no money is paid, nor day appointed*, yet it is a good contract, and the other shall have action of debt, and warranty of the stuff is good. Br. Contract, pl. 36. cites 9 H. 7. 21.

6. If a man *buys a horse of J. N. for his ox*, there *each may take* the thing, viz. the one the ox, and the other the horse; per Yaxley. Br. Contract, pl. 18. cites 21 H. 7. 6.

7. It was agreed, that a bargain for 10 l. *to be paid such a day*, is good. Br. Contract, pl. 15. cites 14 H. 8. 19.

8. *And that a man may sell* his stuff for 10 l. *upon condition that he shall re-have it when he comes to Paul's*; and by the performance, &c. the bargain shall be void. Ibid.

9. *And, per Brudenel Ch. J. if a man sells his horse for 10 l. and accepts 1 d. in earnest*, it is a good contract, and the vendee shall have the horse, and the other shall have an action for his money. Ibid.

10. A. sells a horse to B. *on condition to pay 40 s. for him at Christmas*, and delivers him to B. Afterwards, before Christmas, A. *re-sells* to C. At Christmas B. pays not the 40 s. so that A. *re-seizes the horse*. C. never shall have him; for at the time of the *second contract*, A. had no interest, nor property, nor possession of him, nor any thing but condition, which cannot enable A. to contract for the property and the possession, and so the second contract is merely void; Arg. Pl. C. 432. b. Pasch. 15. Eliz. in case of Smith v. Stapleton.

11. In contracts *every thing requisite ought to concur*, as the consideration of the one side, and the promise or sale of the other side; per Periam J. Godb. 31. in pl. 40. 27 Eliz. C. B.

12. The defendant sold a commissioner's place in the king's troops for 400 l. to the plaintiff, who after he had enjoyed the place 3 years was turned out, and another put in his room, and, as the bill supposed, by the defendant's means or procurement, without any fault of the plaintiff, which was not proved; *it was insisted on by the defendant's counsel, that this is not a cause proper for the Court to relieve*; a contract of this nature being a bargain for a place or office of public trust and concern, viz. to take musters, and though being concerned in military affairs is out of the statute, yet the king may be abused, and false musters allowed. Lord Chancellor said, he wished a law were that such bargains might not be, they occasioning deceit to the king, &c. but seeing the king hath not disallowed them, the plaintiff shall not lose his money, and therefore *what the defendant hath received he shall repay*.

2 Chan.

2 Chan. Cases, 82, 83. Hill. 33 & 34 Car. 2. Conyers v. Hammond.

13. A sum vastly exceeding the allowance per *stat. 21 Jac. 1. cap. 17. 12 Car. 2. cap. 13.* of 5 s. per cent. brokerage was promised by a third person, who was really to pay it, and neither the borrower was to pay or the lender to receive the money, and this was held not within the statutes aforesaid. Carth. 251. Mich. 4 W. & M. in B. R. Bartlett v. Vinor.

14. If a scrivener contracts for more than 5 s. for procuring the loan of 100 l. such contract is void; per Holt Ch. J. Carth. 252. Mich. 4 W. & M. in B. R. in case of Bartlett v. Vinor.

15. Every contract made for or concerning any thing prohibited, and made unlawful by any statute, is void, though the statute itself does not mention that it shall be void, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute; as in the case of *simony*, and of contract for more than 5 s. for loan of 100 l. per Holt Ch. J. Carth. 252. Mich. 4 W. & M. in B. R. in case of Bartlett v. Vinor.

16. It was moved in arrest of judgment in an action brought upon this promise, viz. *if you will procure 15000 l. to be paid into the Exchequer upon the aid of 12 d. in the pound, in any name, or in the name of such person as I shall direct, I will give you 600 l.* and insisted that this was brokerage, and a promise against law; but the Court declared, that nothing appears in the declaration against law; for the borrower does not pay brokerage, nor the lender receive it, but the consideration is wholly between persons not interested in the money. Skin. 322. Mich. 2 W. & M. in B. R. Bartlett v. Vinor.

17. The law knows of no contract but what are good or bad at the time of the contract made, and not to be one or other according to a subsequent contingency; per Cur. 10 Mod. 67. Mich. 10 Ann. B. R. in case of Earle v. Peale.

18. D. ordered C. a broker, to sell 5000 l. S. S. stock upon the 18th of March, 1719-20. Upon the 19th (being Saturday) in the morning, C. told D. that he had sold the said 5000 l. stock to T. at 200 l. per cent. D. went to T. and asked him if he had bought the said 5000 l. stock of C. who told him he had not bought the stock, and thereupon D. went to C. and informed him what T. said, and then C. said it was a mistake, and he had sold 1000 l. part thereof to A. and the 4000 l. residue to B. to be transferred the Wednesday following, and shewed D. his book, wherein he had made an entry thereof. The stock rising very much every day from the said 18th March, and C. having prevaricated with D. and given him a wrong name of the purchaser of the stock, began to suspect that C. had not sold the stock upon the said 18th of March, but meant to take the advantage of the rise to his own benefit, and refused to transfer the stock upon the Wednesday as required by C. and thereupon C. pressed him extremely to transfer the stock, affirming, if it were not done his credit would be blown up in Exchange-alley, and he should be ruined, and begged to have the matter referred, and

Upon a rehearing before Ld. C. King, the Court was of opinion, that it was a fraudulent transaction, and that on the sale, if such there were, he should have taken earnest; for it has been determined here, that such a bargain is within the statute of frauds, and being

to have a meeting together, and bring each of them a friend in order to settle the matters between them; and at that meeting it was agreed that D. * should transfer the 5000 l. stock to such persons as C. should appoint, upon payment of 10000 l. being at the rate of 200 l. per cent. but then C. should deposit 4000 l. in Exchequer orders, in the hands of J. S. and W. R. as a pledge and security for D. in case the arbitrators then chosen should make an award for D. that C. did not sell the stock upon the said 18th of March, to answer the rise of stock to D. between that day and the day on which the stock was delivered, being the Friday following; and upon this agreement D. did transfer the stock for 10000 l. and C. made the deposit. After this one of the arbitrators died before any award made, and then C. brought a bill to have back his deposit, and D. brought a cross-bill to have the deposit delivered over to him, upon a suggestion that C. had kept the stock for himself, and not sold it at 200 l. per cent. as pretended.

It appeared upon the pleading and proofs in the cause, that C. did not sell the 1000 l. stock to A. nor the 4000 l. stock to B. though entered in his books, but the whole 5000 l. stock, or the greatest part thereof, he did retain to himself.

Per Macclesfield C. a broker, or a person acting as a broker, (as C. was, and not so within the statute which prohibits brokers from buying stock for themselves,) cannot retain the stock to himself, which his principal has ordered him to sell, for that is to make the same person both buyer and seller. The broker is intitled by his principal to sell the stock to the best advantage, and if the broker should be allowed to be buyer, in such a case can it be supposed that he will have as great a regard to the interest of his principal, as to his own particular interest and gain? This would be a great inlet to fraud, and a strong temptation to a breach of trust, and ought not to be allowed; and although in the present case D. did agree to the pretended sale of the 5000 l. stock, at 200 l. per cent. upon the information of C. that the stock was sold at that price, yet that subsequent consent, founded upon a misrepresentation, shall not bind in favour of the broker who had deceived him, and when in reality there was no sale at all, but the broker kept the stock for himself, upon a prospect of the rise of stock; and though the broker might be bound to take the stock at the price he informed the principal the stock was sold at, yet it does not follow that the principal shall be bound by his consent, which was founded upon a fraud and deceit in the broker. A broker cannot retain the stock which his principal orders him to sell, unless he expressly acquaints his principal therewith, and he gives his consent thereto; for then it is not a sale from the broker to himself, but he buys it of his principal himself, which he may as well do as of any other man. Decreed the deposit to be delivered to D. with costs. MS. Rep. Mich. 11 Geo. Crull v. Dodson, & c contra.

N. B. This decree was re-heard, July 8, 1725, before King C. post term. Trin. 11 Geo. and the decree affirmed.

without earnest, is only nudum pactum; that the decree should have been to account for the 5000 l. and the produce of it; but as the plaintiff acquiesces under the decree, and it is re-heard on the petition of the defendant, the Court can do no more than affirm the decree. See Select Cases in Chancery in Ld. King's Time, 42- S. C.

(D) Agreement necessary to the vesting of Things.
In what Cases.

1. **WHERE** an estate is given to one by a lastful act, it shall be adjudged in the party before agreement until it be disagreed to. Arg. 2 Leon. pl. 97. Trin. 28 Eliz. B. R.

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Litt. Rep.
61. S. C. in
totidem ver-
bis.

2. *Assumpsit*, and declares that the defendant die Maii, anno Dom. 1625, in consideration that the plaintiff would permit the defendant to re-enter into a messuage andcroft in which the defendant had dwelt before, promised to pay to him 30 s. yearly during the time that he enjoyed it, and that he permisset ipsum reintrare, and he enjoyed it a year and half, which ended at Mich. 1626, and because he would not pay 45 s. he, &c. Upon non assumpsit it was found for the plaintiff. It was moved in arrest of judgment, that the assumpsit being to pay 30 s. annuatim, before the year be determined, nothing is due, and the plaintiff cannot divide the rent, and cited 5 R. 2. Annuity, 21. Debitum judex non sepat. Then when it does not appear that the action lies for the 15 s. for the half year, and the jury assessed damages intirely, it is void, as 10 Rep. 130. OSBORNE'S CASE; and it appears, that by his computation of time, it is not a year and a half from the time of the assumpsit made. Richardson said, that it is not secundum ratam, for then he might divide the rent, and no day is limited for the payment of it; for if a lease be made for two years, or at will, paying annually at Michaelmas 30 s. and the lease is determined after half of the year, although it be by the lessee himself, he cannot pay any rent; but Yelverton said, that that is not a rent, but a collateral sum, and debt does not lie for it; and in the declaration it is said, quod permisset ipsum reintrare, and does not say at what time, which was naught by all, but Hutton; and it ought to be also, that he did de facto re-enter. And per Hutton, if it had been said, so long as you shall occupy the land, you shall pay annually, &c. that he may demand half of the year, but the whole Court against him, and judgment was stayed. Hetl. 53. Mich. 3 Car. C. B. Wentworth v. Abraham.

3. Upon an *assignment of a judgment*, the judgment immediately vests in the assignee before his acceptance of it; Arg. cites Butler v. Baker. And. 348. Poph. 87. 3 Rep. 25. 10 Mod. 189, 190. Mich. 12 Ann. B. R. in case of Turner v. Goodwin.

4. A. sent goods out of the country to B. and B. apprehensive that he should soon be a bankrupt, delivers a quantity of goods, mostly the same, to C. for the use of A. but before A.'s acceptance B. became bankrupt. Resolved by the judges of B. R. on a reference to them by Parker Ch. J. before whom the case was tried, that the property of the goods were so vested in A. by the delivery of the goods to C. for the use of A. that they were not subject to the disposal of the commissioners of bankruptcy. 10 Mod. 432. Mich. 5 Geo. 1. B. R. Atkins v. Berwick.

(E) Construction and Extent thereof.

1. *WHERE there is a bargain between E. and A. for 10l. that E. shall instruct A. in such a science, and the money is not paid, and A. dies within three weeks, E. shall not have an action for the 10l. for the cause is ceased.* Br. Contract, pl. 12. cites 21 E. 3. 11. So if the money had been actually paid, action would not lie to enforce E. to

repay the money. Ibid. — Br. Dette, pl. 84. cites S. C.

2. He who *sells trees* is not bound to suffer the other to take them if he does not pay the money. Br. Contract, pl. 26. cites 18 E. 4. 5.

3. If I *sell my horse* to you for 20l. you shall not have the horse if you do not pay the money presently; for, though I am content that you shall have him for 20l. yet if it is not paid presently, but another comes and gives me 20l. for him, and I accept it, there the second shall have it, and not the first who did not pay me; per Carell Serjeant, which Fitzh. J. and Brudnel Ch. J. agreed. Br. Contract, pl. 15. cites 14 H. 8. 19.

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4. But if a future day of payment be agreed, then it is a good bargain, and the vendee has possession immediately, and the vendor shall have action at the day; per Fitzh. Ibid.

5. But if you are in the market and offer me a piece of cloth for 20s. and I agree, and as I am telling the money another comes and gives you 20s. for it, and you agree, yet I shall have the cloth, for there is no default in me; per Brooke J. which Pollard J. agreed. Ibid.

6. But if I depart, and before my return you sell the cloth to another, there I shall not have the cloth, because I did not pay presently, nor no day of payment was given between us; per Brooke J. which Pollard J. agreed; but otherwise it seems, if vendor had agreed to stay till the vendee had fetched the money from his house. Ibid.

7. But if the vendor and vendee are agreed for 20s. and the vendor delivers the cloth to the vendee, and he accepts it, there this is a perfect bargain, and so see a diversity between a perfect bargain and a communication; per Brooke J. Br. Contract, pl. 15. cites 14 H. 8. 19.

8. But sale of stuff for so much as J. N. shall arbitrate is a good contract if he arbitrates what, &c. and if he will not arbitrate any sum, then the bargain is void; per Pollard, to which Brudnel Ch. J. agreed, and by him if J. N. was present and would not say the bargain is void, but if he be absent the bargain is good till J. N. refuses to say what shall be paid, and the party shall have reasonable time to move J. N. what he shall say, &c. having regard to the distance of the place where he dwells. Ibid.

9. And a man may sell his stuff for 10l. upon condition that he shall have it again when he comes to Paul's, and by the performance, &c. the bargain shall be void; per Pollard. Ibid.

10. And

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10. And if a man sells his horse for 10 l. and accepts 1 d. in earnest, it is a good contract, and the vendee shall have the horse, and the other shall have an action for his money; per Brudmel Ch. J. Ibid.

11. In every agreement made between parties the *intent* is the chief thing to be considered, and if, by the act of God, or by any other means not arising from the party himself, the agreement cannot be performed according to the words, yet the party shall perform it as near the intent as may be. Pl. C. 290. b. Arg. Trin. 7 Eliz. in case of Chapman v. Dalton.

12. A contract may be void in part and good in part. Arg. Pl. C. 433. a. Pasch. 15 Eliz. in case of Smith v. Stapleton.

13. If a man retains a servant generally, without expressing any time, the law shall construe it to be for a year, because such retainer is according to law. Co. Litt. 42. b.

14. In all contracts he that speaketh *obscurely or ambiguously* is said to speak at his own peril, and such speeches are to be taken *strongly against himself*. Noy's Maxims, 91.

And see Sid.
270. Pleas-
v. Paltry,
S. C. that if
it had been
on demurrer
or special
issue it had
been ill.

15. B. agreed to give A. 2 s. per seame for all the bark of the wood which A. should cut, and B. promised to have articles ready such a day containing the agreement, and a bond for performance; but no sum was mentioned, nor to whom; and therefore it was argued, that the agreement was void; but, per Cur. B. the defendant ought to have given a bond, and the sum may be reduced to certainty according to the value of the bark, and should not have pleaded non assumpsit. See Keb. 776. pl. 15. Mich. 16 Car. 2. B. R. Paltry v. Plees.

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16. All agreements must be construed *secundam subjectam materiam*, if the matter will bear it, and in most cases are governed by the intention of the parties and not to work a wrong; and therefore if tenant in tail makes a lease for life, it shall be taken for his own life; and yet if before the statute of entails he made such a lease, he being then tenant in fee simple, it had been an estate during the life of the lessee; but when the statute had made it unlawful for him to bind his heir, then the law construes it to be for his own life, because otherwise it would work a wrong. Arg. 2 Mod. 80, 81. Pasch. 22 Car. 2. C. B. in case of Richards v. Sly, cites Co. Litt. 42. [a. b.]

17. Every agreement must have some *reasonable construction*, which may be consistent with the intent of the parties. 2 Vent. 278. Hill. 2 & 3 W. & M. in C. B. Target v. Floyd.

18. If a man sells 2 horses for 20 l. one is his own and the other a stranger's horse, if the one be defeated he shall have an action for all the 20 l. because it is an entire contract. Per Doderidge J. 3 Bulst. 232. cites Br. Cases, 9. pl. 52.—Where a man's contract has subjected him only to one action, it cannot be divided so as to subject him to two. 1 Salk. 65. pl. 2. Mich. 10 W. 3. B. R. Hawkins v. Gardee.

19. The construction of *marriage articles*, where there appears to be an intent that lands shall be settled upon the issue of that marriage, is to make the father tenant for life, remainder to the first and

and every other son of A. in tail male. MS. Tab. March 6, 1726. Martin v. Martin.

20. A. before marriage settled 300 l. a year on M. his wife, in bar of dower and thirds, and what she might claim by the custom, but not to extend to household goods. At the time of the settlement the husband was under a contract with the commissioners of the navy to take care of wounded sailors, where he had great quantities of goods for that purpose. Ld. C. King decreed for a share of those goods; but on appeal to the Lords this decree was reversed. Sel. Cases in Chan. in Ld. King's Time, 52. Mich. 11 Geo. Clerke v. Jackson.

21. Marriage articles recite, that lands covenanted to be settled were 500 l. per ann. but there was no express covenant that they were so, yet decreed that the deficiencies should be made up out of other lands. MS. Tab. March 14th, 1728. Gleg v. Gleg.

22. Contracts are to be judged according to the law of the place where such contracts are made. MS. Tab. May 23d, 1728. York-Buildings Company v. Meers.

(F) Performance. What is; and by whom, when, and how it must be.

1. If a man sells a lease of land, and certain cloths for 10 l. the contract is intire, and it cannot be severed. Br. Contract, pl. 35. cites 7 H. 7. 4.

2. And if the one of them was by defeasible title, yet the vendor shall have the intire sum, though the one part was devested from the vendee. Ibid.

For contract cannot be severed. Ibid. cites M. 24 H. 8.

3. The law is, that no contract shall be apportioned; per Curiam. Owen, 10. cites Bendl. 14 H. 7.

4. Agreements may be said performed when the intent is performed, though it be not according to the words. Pl. C. 291. a. b. in case of Chapman v. Dalton.

And so they may be said not to be performed where the

performance is according to the words, but not according to the intent. 291. b. Ibid.

5. If a man comes to a shop to buy, he ought instantly to pay; otherwise it is no contract executed. Per Williams J. Yelv. 125. Pasch. 6 Jac.

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And if the price is agreed upon, and then the buyer

takes the goods away without payment or delivery of the owner, trespass or trover lies, notwithstanding the bargain. Mod. 137. per Hyde J. cites 21 H. 7. 6. — On contracts for chattels, if no time is limited for payment of the money, it must be paid presently. Mo. 472. Obiter. — Adjudged D. 30. pl. 203. — 6 Mod. 162. Pasch. 3 Ann. per Holt Ch. J. S. P.

6. A. promises B. that if he will grant him a lease for 21 years at 10 l. per ann. that he will give him an horse. B. grants a lease for 21 years, but to intitle himself to the horse it must be at the very rent of 10 l. and so a lease of 60 years would not intitle, though 21 are contained in 60. 3 Bulst. 35. Pasch. 13 Jac. Lea v. Adams.

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7. A.

Contract and Agreement.

7. A. bids B. *do an errand at York and he will give him 40s.* Afterwards A. says, *do this errand for me at your house, and this shall suffice*; yet if B. goes not to York, and does his errand according to that contract on which the promise was grounded, he shall never have the 40s. because he has not pursued the body of the contract. Per Coke Ch. J. 3 Bulst. 36. Paich. 13 Jac. Lea v. Adams.

8. If one contracts to pay another for any thing *tantum quantum meruit*, as for a quarter's board, if he will go away 2 or 3 days after, he shall pay for the residue. Per Coke Ch. J. 3 Bulst. 188. Trin. 14 Jac. in the case of Cotton v. Wescott.

9. A. promises B. 20l. *on delivery of 20 quarters of corn* by him; B. delivers 10 quarters, B. shall not have action on the case for the promise before he has delivered all. Per Crew Ch. J. 3 Bulst. 325. Hill. 1 Car. B. R. in case of Hungerford v. Haviland.

10. The plaintiff had agreed with two of the defendants to pave their streets in Putney, and they on the behalf of the parish agreed to pay him for them, which agreement was put into writing, and remains in the hands of the defendant W. The work was done according to the agreement, and it came to 360l. The plaintiff preferred his bill in equity against them with whom he had agreed, and against others of the parish who had agreed with the undertakers for the parish to pay their shares; and per Curiam the plaintiff must have relief against the undertakers, especially in this case, because the written agreement, which is his evidence, is in the hands of one of the defendants, and the undertakers must take their remedy against the rest of the parish. Hardr. 205. pl. 5. Mich. 13 Car. 2. in Scacc. Meriel v. Wymonfold & al.

11. The manner of performing a contract is to be guided by *usage and custom*, as if a taylor is to make a suit, the cloth must be found for him, but a shoemaker is to find leather to make a pair of shoes; per Curiam. Lev. 93. Hill. 14 & 15 Car. 2. B. R. in the case of Oles v. Thornhill.

12. Agreement on marriage by articles to settle 1900l. per ann. jointure, and 1500l. per ann. on the issue of the marriage, the lands settled on the issue did not hold out to be 1500l. per ann. and great part of that too in reversion. The husband devises his land unsettled for payment of his debts, the dispute was between the creditors and trustees of the infant son and widow. Per Cur. there is no covenant that the estate shall continue of the value in the articles, nor that it should be *of that value in present possession*, and therefore the settlement ought to stand, the articles being sufficiently performed. 2 Vern. R. 272. pl. 257. Trin. 1692. Whitchurch v. Lady Ann Bainton.

1 Salk. 172.
Collonell v.
Briggs.
8. P.

13. A. covenants to *transfer stock on such a day* to B. his executors, or assignees, B. covenants that he or they shall accept in the usual manner upon the said day, and *eodem tempore solvent* the money; defendant pleads no transfer, so he could not accept; it was argued that according to the case of Carter v. Taylor adjudged

judged the last term, defendant ought to have tendered his money and demanded a transfer and judgment pro quer'. Show. 390. Pasch. 4 W. & M. Smith v. Cudworth.

14. A. bought of the defendant all his corn growing in such a close for 20l. before the reaping; the defendant in consideration A. had paid 10l. in hand, and promised to pay so much more residue, &c. promised to deliver the corn. Resolved in this case there needs no averment that he was ready, &c. For there is a *promise against a promise* which gives mutual remedy, but if it had been sold *proinde* the money must have been first paid. Cumb. 256. Pasch. 6 W. & M. in B. R. Mansfield v. Stephen.

15. Every man's bargain ought to be performed as he *intended* it; when he relies on his remedy it is but just he should be left to it according to his agreement, but on the contrary there is no reason a man should be forced to trust where he never meant it. 1 Salk. 171, 172. Pasch. 13 W. 3. Thorp v. Thorp.

16. If I sell you my *horse* for 10l. if you will have the horse I must have the money, or if you will have money I must have the horse. Per Holt Ch. J. 1 Salk. 113. pl. 1. Trin. 2 Ann. at nisi prius.

The property is not altered till the money paid, and the owner

may sell him to another. Per North Ch. J. 2 Mod. 243. in case of Mires v. Solebay.

16. By marriage articles it was agreed that 6000 l. *in the hands of the trustees should be laid out in the purchase of lands to be settled on the husband for life, remainder to the wife for life for her jointure, remainder to the first and every other son of that marriage in tail male successively, chargeable with 2000 l. for younger children, remainder to the husband in fee; the father by the same articles covenants after his decease to settle other lands upon the husband and the heirs males of his body, remainder to the heirs of the father.* One point was, the father of the husband having made a settlement of the lands agreed to be settled by the marriage articles, on the husband and the heirs males of his body, with remainder to himself in fee, if this is a good performance of the agreement, and if the limitation ought not to have been on the husband for life, with remainder to his first, and every other son in tail male successively in strict settlement. Ld. C. King was of opinion, that the settlement made by the father, on the husband and the heirs male of his body, was a good execution of the agreement; by the articles these lands were not intended to be settled as a provision for the children of that marriage, they were taken care of by the other part of the articles, by the trust money, but for the support and provision of the husband; and it is not like the common case of articles for a settlement on the marriage where no other provision or care is taken for them, and the different manner of penning the articles in relation to the trust money, and as to these lands, the one to be in strict settlement to the first, and every other son of that marriage, the other limitation to the husband, and the heirs males of his body generally and not tied up to the issue of that marriage, shews plainly the parties understood and had in contemplation the difference between a strict settlement upon the

Gibb. 127. S. C.

issue of that marriage and a general settlement upon the husband and the heirs males of his body, and his lordship confirmed the settlement. MS. Rep. Trin. 3 Geo. 2. Canc. Chambers v. Chambers.

[514] 17. Bill was brought against defendants, being 3 of the trustees of the Sun-fire Office, to make good a loss by fire, &c. The case was, that plaintiff had a *policy* upon which he usually paid 2s. per quarter, and by the proposals was to pay on the quarter day, or within 15 days after; and the method of collecting the money was by the agents of the office calling at the persons houses, which they sometimes did within the 15 days, and sometimes a few days after. Plaintiff's policy expired at Michaelmas 1727, and the 15 days were out, the 14th Oct. the agent of the office did not call for the 2s. and on the 5th of Novem. following, plaintiff's house was burnt. A. B. the agent of the office examined for plaintiff, swore that if the fire had not happened he should have called on plaintiff for his quarterage the 6th or 7th of the same Nov. For plaintiff it was insisted that this non-payment by the plaintiff was not by any default of his, but happened by the course and method of defendant's collecting, and the negligence and omission of their servant or agent, &c. and therefore ought not to be turned to plaintiff's prejudice, &c. It was insisted for defendant, that there was one subsisting contract between the office and plaintiff at the time the loss happened, for by the payment only the contract is renewed. And as to the objection that this is but relieving in point of time or a day, it was answered that here no contract arises till the payment; for the insurance is but from quarter to quarter, and every payment is a new contract, &c. Ld. Chan. said that in law this policy is an agreement to insure quarterly as long as the parties please. This insurance was on books, and the party to pay quarterly; the continuance, or not, depends on the act of the party insured, (viz.) on his paying 2s. per quarter, and upon his paying at the quarter, or within 15 days after, the insurers covenant to pay, &c. the loss. And in a declaration at law the payment within the 15 days must be averred. As to equity, if the office had dispensed with the time and taken the premium after, this court would have held them to it, because it was their own act. But here it was neither paid nor tendered; the office appointed a collector for the benefit and ease of the persons paying, &c. and to prevent any misunderstanding there is a memorandum on the very receipts, that the payment after the 15 days was not to dispense with the time, and the agent had no authority after the 15 days to take the money. The premium is the consideration and is to precede, and if the 15 days be not the time, what shall be the time, &c. within which it shall be necessary to pay, &c. Bill dismissed. MS. Rep. Mich. 4 Geo. 2. Canc. Fisher v. Brocas.

(G) Agreement, &c. determined, extinguished, or discharged, by what and how.

1. A Man made a contract to serve for a year, for 20s. to be paid at 2 terms, the master died after the first term passed and before the last term, and he was barred of the rest of the salary, for by the death of the master he could not serve him, and so the contract determined. Br. Contract, pl. 30. cites 27 E. 3. 84. and Fitzh. Dett. 143. Br. Appor-
tionment,
pl. 26. cites
S. C.

2. Debt of 20 l. upon a contract, the defendant said that the plaintiff after took an obligation of 10 parcel thereof, and held a good plea to the whole contract, for a contract determined in parcel is determined in all, for it is intire, and issue was taken that the obligation was made for other matter. Contract, pl. 8. cites 3 H. 4. 17.

3. Contract shall be determined if the debtor makes obligation to the creditor, but one obligation does not determine another obligation nor record, as account made before auditors, but both remains. Br. Contract, pl. 33. cites 11 H. 4. 79. and 3 H. 4. accordingly, for otherwise it would be a double charge.

4. And by the opinion in 20 H. 6. 21. if a * contract is made of the thing which comes to the use of the house by an abbot, there if the party takes obligation, it shall determine the contract which at first might have charged the successor, and the obligation of the abbot alone will not charge the successor. Ibid. [515]
* S. P.
Contract,
pl. 45. cites
10 H. 7. 21.

5. Note, it was almost agreed for law, that if a man retains a servant for 20s. for a year, and the master discharges him within the year, to which the servant agrees, that there the servant shall not have an action for any of his wages for service done before his discharge nor after, for the sum is not payable but in the end of the year, and the contract is intire and cannot be severed. Br. Contract, pl. 31. cites 10 H. 6. 23.

6. If an abbot buys goods, which comes to the use of the house, so that the house is charged in case the abbot dies, there if the vendor takes obligation of the abbot alone for the debt, this shall discharge the contract, and there if the abbot dies, the action is determined, and the debt is lost. Br. Abbe, pl. 20. cites 20 H. 6. 21.

7. A contract cannot be severed nor apportioned, therefore in lease of a chamber and boarding of the lessee, rendering for the chamber and boarding 6s. by the week, if in debt upon it he pleads quod non dimisit cameram, this goes to all, because contract is intire, and if it be destroyed in part it is destroyed in all. Br. Apportionment, pl. 7. cites 9 E. 4. 1.

8. If a man recovers in debt upon contract, and does not take execution, yet he cannot have a new action of debt upon the contract; for the contract is determined by the judgment of record. Br. Contract, pl. 39. cites 9 E. 4. 51.

9. If 2 are agreed upon the price, and the buyer departs without tendering the money, and comes the next day and tenders, the other

may refuse, for he is not bound to wait upon him unless a day of payment was agreed between them. Br. Contract, pl. 26. cites 18 E. 4. 5.

10. In debt, if the bargain was *that the plaintiff shall give to the defendant 10l. for so much wood, if he likes it* upon the view of it; there, per Littleton, Brian, and Choke J. if the *plaintiff upon the view of it disagrees to the bargain*, then it is a void bargain though he agrees to it after. Br. Contract, pl. 27. cites 18 E. 4. 15.

11. *And if he agrees to it then it is a perfect bargain though he disagrees after, for the first act shall bind.* Per Littleton, Brian, and Choke, quod nemo negavit. Ibid.

12. *A man may sell his stuff for 10l. upon condition that he shall re-have it when he comes to Paul's*, and by the performance, &c. the bargain shall be void. Br. Contract, pl. 15. cites 14 H. 8. 19.

13. If a man be indebted to me by contract, and after makes to me an obligation of the same debt, the contract by this is determined, for in debt upon the contract it is a good plea that he has an obligation of the same debt. Br. Contract, pl. 29. cites 29 H. 8.

14. *But if a stranger makes to me an obligation for the same debt, yet the contract remains, because it is by another person, and both are now debtors.* Ibid.

And upon that reason one PUDSEY'S CASE was adjudged; where upon the contract, a stranger to the contract

being present, promised to enter into a bond unto the party, &c. for the payment of the money agreed for upon the contract, and afterwards became bound accordingly; in that case the contract was determined, because the obligation was pursuant to the contract.

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So of a legacy, and J. Doderidge's opinion in Gardiner's case, 2 Roll. denied. 8 Mod. 328. Mich. 11 Geo. 1. 1725. in case of Cusband v. Dewsbury.

16. Acceptance of a bond for money due on a contract is a discharge of the contract. Noy, 140. Oldfield's case.

opinion in Gardiner's case, 2 Roll. denied. 8 Mod. 328. Mich. 11 Geo. 1. 1725. in case of Cusband v. Dewsbury.

17. An agreement made between the parties by *parol* only, may be discharged and made void, at any time *before it is broken*, by *parol* only without satisfaction; for *eodem modo quo oritur, eodem modo dissolvitur*; but after it is broken it can *not* be discharged *without satisfaction* (22 Car. 1. B. R.); for by the breach there is a wrong done to the party, which the words cannot release without satisfaction; but before the breach no injury was done to either party, nor any of them injured by such a discharge. L. P. R. 48.

18. If an agreement made by *parol* to do any thing be afterwards *reduced into writing*, the *parol* agreement is thereby discharged; and if an action be brought for the non-performance of this agreement, it must be brought upon the agreement reduced

duced into writing, and not upon the parol agreement (Pasch. 22 Car. 1. B. R.); for both cannot stand together, because it appears to be but one agreement, and that shall be taken which is the latter, and reduced to the greater certainty by writing; for vox emissæ volat, litera scripta manet. L. P. R. 48.

19. A parol agreement is *determined* by the giving of a bond. Chan. Cases, 226. Pasch. 26 Car. 2. Davis v. Curtis.

20. *A. on the marriage of N. his son with M. made a settlement, and limited 6000 l. for daughters' portions. There was one daughter, who married J. S. and the 6000 l. being become due, B. entered into articles with J. S. to pay the 6000 l. within four years, and interest in the mean time. On a bill for the 6000 l. it was insisted, that notwithstanding such deed of settlement, the plaintiff ought to resort to the articles for relief; for that by those articles the deed was made void, and not to resort to the settlement and articles both as they had done. The Court decreed, that the articles did not impeach or vacate the settlement. Fin. Rep. 237. Mich. 27 Car. 2. in Canc. Briscoe & Ux' v. Denbigh (Earl) & al'.*

21. An obligation may be pleaded in bar of a *simple contract*. 2 Jo. 158. Trin. 33 Car. 2. B. R. Shelden v. Clipsham.

Raym. 449.
S. C. accordingly.

22. Bill to have agreement in *writing* executed in specie; per North K. such agreement may be *discharged by parol*, since the statute of frauds. Vern. K. 240. Pasch. 1684. Goman v. Salisbury.

23. Bill to have the benefit of an agreement, surmising that *A. agreed that on failure of issue male of his own body, the land should remain to B. the plaintiff, and that A. and his heirs should stand seised of the premises upon such trust as aforesaid. The Court supposed the deeds produced by the plaintiff purporting such agreement to be forged; but in case there was any such real agreement, yet it was well barred by the subsequent agreement.* 2 Vern. 129. Hill. 1690. per Lords Commissioners. Aynesley v. Vaughan.

24. Agreement *between lord and his tenants for inclosing a common*, that the tenants should quit their right of common, and the lord should release them all quit-rents, *the inclosure was prevented by pulling down the fences, and the tenants continue to use the common, this is a waiver of the agreement.* MS. Tab. Jan. 2, 1719. Lady Lanesborough v. Ockfhot.

25. *A. made a purchase before a master in Chancery for 10,050 l. and deposited 1000 l. Upon its being prayed that A. might compel his purchase, he by his counsel offered to lose his deposit and not to proceed, which Lord C. Macclesfield decreed accordingly, and observed, that according to his apprehension, a court of equity ought to take notice under what a general delusion the nation was at the time of this contract made (viz. in the S. S. year) when people put imaginary values on estates.* Mich. 1721. Wms.'s Rep. 745. Savile v. Savile.

Wms. Rep. 746. in a note at the bottom says, that the S. P. was determined some little time before in the case of MERRET v. BENNET, and

also in the case of Dr. Tennison v. Lord Bulkley.

26. Where an agreement is reduced into writing, all previous treaties are resolved into that. Sel. Cases in Chan. in Lord King's Time, 20. Trin. 11 Geo. 1, *Christmass v. Christmass*.

(H) Parol, what is; and made good, in what Cases.

1. 29 Car. 2. *ALL* leases, estates, interests of freehold or terms of cap. 3. f. 1. years, or any uncertain interests in or out of any lands, tenements or hereditaments, not put in writing and signed by the parties making them, or their agents authorised by writing, shall have no greater effect than as estates at will, except leases not exceeding three years, whereof the rent shall be two thirds of the full value.

The clause, viz. unless the agreement be to be performed within the space of a year, extends not to

any agreement concerning lands or tenements, admitted. Vern. 159. Pasch. 1683. in case of *Deane v. Isard*. — Adjudged in error, that a contract to assign over a term is within the stat. as well as an interest created de novo. 1 Vent. 361. Anon. — Payment of money binds only in contracts for goods, not is a general item or memorandum sufficient, though signed by the party; but it ought to specify the terms, as the sum to be paid, and the number of houses to be sold or disposed of, and to whom and how. Pasch. 1721. Ch. Prec. 560. *Seagood v. Meale and Leonard*. — An agreement was made, that in consideration of 5 l. paid by the plaintiff to the defendant, he promised to pay the plaintiff 10 l. on his day of marriage, which happened about nine years after this agreement; adjudged that a memorandum in writing was not necessary in this case, because the marriage might have happened within a year after the agreement made. 3 Saik. 9. * *Smith v. Westhall*. — Ld. Raym. Rep. 316. S. P. cited by Northey, and that it was held by the judges at Serjeant's Inn to be out of the intent of the statute, and good, because it might have been performed within a year; and Holt Ch. J. granted that it was so adjudged. — Comyns's Rep. 50. S. P. cited as resolved by the major part of the judges in B. R.

* The case of *Smith v. Westhall* was upon the statute of brokers, of 8 & 9 W. 3. for which see tit. Stocks (A), pl. 4. and the notes there.

3. S. 17. No contract for the sale of goods, wares, or merchandises, for 10 l. or upwards, shall be good, except the buyer actually receives part of them, or gives something in earnest, or some note thereof in writing he made and signed by the parties to be charged, or their agents.

4. A verbal agreement, though subsequent to a decree, yet shall not stay the execution of it, but must bring an original bill. 2 Chan. Cases, 8, Mich. 31 Car. 2, *Wakelin v. Walthal*.

† S. P. cited Ch. Prec. 561. to have been decreed per Master of the Rolls Mich. 1727. in case of *Smith v. Westhall*.

5. A bill in Chancery was to have the execution of a parol agreement for a lease of a house, setting forth, that † in confidence of this agreement the plaintiff had laid out and expended very considerable sums of money, &c. Defendant pleaded the statute of frauds and perjuries, and the plea was allowed. But Lord K. was of opinion, that if the plaintiff had laid in his bill that it was part of the agreement that the agreement should be put in writing, it would alter the case, and possibly require an answer. Vern. 151, pl. 141. Hill. 1682, *Hollis v. Whiting*.

6. *In such case*, per North K. the lessee ought to be repaid his consideration-money if any, but for the money expended he directed a trial at law. Vern. 159. pl. 148. Pasch. 1683. Dean v. Izard.

7. *And* per North K. *though the act makes the estate void*, yet it says not that the agreement shall be void, and therefore the agreement may subsist, though the estate is void; so that damages may be recovered at law for the nonperformance, and if so he should not doubt to decree it in equity. Vern. 160. Pasch. 1683. Dean v. Izard.

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8. *Lease for years* to A. in writing, but by parol agreed by him to be *in trust for himself and B.* jointly, and B. paid a moiety of the rent; whether this is within the statute of frauds? Vern. 108. pl. 97. Mich. 1682. Riddle v. Emerson.

9. A. agreed to *assign a term* for years in his house and plate, and certain vessels of beer, for 200 guineas to B. whereof B. paid one guinea in hand, as earnest of the bargain, and three days after 19 guineas more; and *part of the bargain was, that it should be executed by writings* by a certain day. A. pleaded the statute of frauds, &c. and that it was a parol agreement, and none of the goods delivered by A. but confessed the receipt of the 20 guineas, and offered to repay them. North K. over-ruled the plea, it being charged that the agreement was to be put in writing. 2 Chan. Cases, 135. Hill. 34 & 35 Car. 2. Leak v. Morrife.

10. An insurance was made, but there was a *parol agreement at the same time, that the policy should not commence till* the ship came to such a place, and it was held in the time of Pemberton Ch. J. that the *parol agreement should avoid the writing*; cited per Holt Ch. J. at nisi prius at Guildhall. 2 Salk. 444.

11. A settlement of a jointure actually made and accepted, and the marriage thereupon had, is an evidence that all parol agreements before the marriage were *resolved into the jointure*; but ordered defendants to answer, and to save the benefit of the plea to the hearing. Per Jefferies C. Vern. 369. pl. 362. Hill. 1685. Bellasis v. Benson,

12. Parol agreement *varied from* in a deed of trust executed in order to avoid a seizure by the sequestrators in the life of Cromwell, decreed 3 several times by 3 several persons to be made good, though contrary to the deed. 2 Chan. Cases, 180. Mich. 2 Jac. 2. Harvey v. Harvey.

As to this case, Reynolds Ch. B. said, that though generally no parol evi-

dence is to be admitted against a deed, yet the declaration in this case being previous to the deed, and the design of it plainly appearing to be to protect the estate from a sequestration, that resolution is very right; but to admit parol evidence without such a foundation would be a very dangerous precedent. L. P. Conv. 396. in case of Fitzgerald v. Ld. Fauconberg. — Gibb. 213. Hill. 4 Geo. B. R. the b. C. & S. P.

13. A. and B. being joint lessees of a building lease, A. by parol agrees to sell his interest to B. and accepts a pair of compasses in hand to bind the bargain; defendant pleads the statute of frauds. The agreement being in some part executed, the Court ordered the defendant to answer, and save the benefit of the plea to the hearing. Vern. 472. pl. 460. Mich. 1687. Alfop v. Patten.

14. A

Tenant in tail being about to suffer a recovery, in order to provide for his younger children, and

had been kept from it by the *promise of the issue* in tail to do it, the issue in tail after the father's death was decreed to provide for them. Per Keck. Com. Chan. Prec. 5. Hill. 1689. in case of *Devenish v. Baines*.

14. A son and heir apparent persuades his father (who was about to make a will and provisions for younger children) not to make any will, and *promises to make the like provisions for them*, whereupon the father forbore making such provisions, and the heir was decreed to make them. Arg. Ch. Prec. 4. Hill. 1689. cites Chamberlain's case.

15. *A copyholder by his will intended to give the greatest part of his estate to his godson, and the other part to his wife; the wife persuades him to nominate her to the whole, and that she would give the godson the part designed for him; on a bill by the godson for those lands, it was decreed against the wife, notwithstanding the statute of frauds and perjuries.* Chan. Prec. 3. pl. 3. Hill. 1689. *Devenish v. Baines*.

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Though the promise depends on a contingent, *which may not happen in a long time, yet if the contingent doth happen within a year, the action shall be maintainable, and is not within the statute.* Per Holt Ch. J. upon evidence. *Skin. 326. pl. 4. Mich. 4 W. & M. Francam v. Foster.*

16. A parol promise was made to *pay so much money upon the return of such a ship, which ship happened not to return within two years after the promise made*, and whether this parol promise was void by the statute of frauds was made a question before all the judges; and they were of opinion that this was a good promise, and not within that clause of the statute; for that *by possibility the ship might have returned within a year; and though by accident it happens not to return so soon, yet, they said, that clause of the statute extends only to such promises, where, by the express appointment of the party, the thing is not to be performed within a year.* This case was related by Treby Ch. J. 1 Salk. 280. pl. 5. Pasch. 5 W. & M. C.B. Anon.

See tit. Marriage (B. a), pl. 1. and the note there.

17. When O. was going to be married to M. the wife's uncle promised that he would settle his freehold and copyhold upon his wife and her issue. Though this was by parol only, yet Chancery decreed an execution of it; being in consideration of marriage. 2 Freem. Rep. 199. pl. 274. Trin. 1694. cites it as Sir John Otway's case.

2 Vern. 322. pl. 309. S. C. but not so full.

18. The bill was for a marriage portion of 3000 l. upon the marriage of the plaintiff with the defendant's daughter, there being no note or agreement in writing signed by the defendant for the payment of it; but it appearing that a letter was wrote to the plaintiff by a third person, offering so much portion, which letter it appeared was wrote by the consent of the defendant, and that afterwards he was acquainted with it, and agreed to it, and a treaty was had for a settlement suitable to it with the defendant, but the treaty depending long, the young couple married; and although it appeared that the defendant, before they went to church, did declare he would give them nothing, and the statute of frauds and perjuries was insisted upon, yet decreed for the plaintiff, although his wife is since dead, and the plaintiff married to another. And the

Lord Keeper said, as to his countermand when they were ready to go to church, he looked upon it as nothing, after the young people's affections were engaged; and for the statute of frauds and perjuries, he cited two cases, one of HART AND MORE, where a portion was decreed upon a letter wrote; and another case of MASQUILL, &c. where *writings were prepared and agreed, but being blotted, were ordered to be wrote fair, and were so, but before they were sealed the party died*, and this Court charged the executor with the portion agreed to be paid. 2 Freem. Rep. 201. pl. 276, Mich. 1694. Wanckford v. Fotherley.

19. It was said, that *before the statute of frauds and perjuries, this Court would not execute a parol agreement, unless it had been executed in part of the one side or the other*, and then it would; because it was but reason, when one party had performed of his part, that the other party should be compelled to perform of his part; but if an agreement be under hand and seal, that is supposed to be made and transacted with greater caution and solemnity, and though there had been no execution of either side, yet this Court will compel the execution of it. 2 Freem. Rep. 216. pl. 289. Mich. 1697. Normandy (Marquis) v. Duke of Devonshire.

20. It was said by the attorney general, that since the statute of frauds, &c. if *an agreement be made, and reduced into writing, and signed, but not sealed, that this is still but a parol agreement, and the writing is only an evidence of it*. 2 Freem. Rep. 217. pl. 289. Mich. 1697. Normandy (Marquis) v. Duke of Devonshire.

21. A man *contracts to pay 100 l. upon the day of his marriage*; this needs not be put in writing, not being within the intent of the statute of frauds, the words whereof are, that every contract to be performed within one year after the making shall be put into writing, so that the design of the statute was, that only those contracts that were impossible to be performed within that time, &c. Now this contract *depends upon a contingency, that may or may not be performed within the year*, and therefore is casus omnisus out of the stat. as was resolved by most of the judges, by information of Holt Ch. J. Comb. 463. Mich. 9 W. 3. B. R. Anon.

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22. If a bill be brought for execution of a parol agreement which is in no part executed, if the *defendant by answer confesses the agreement* * without insisting on the statute of frauds and perjuries, the Court will decree an execution of it; because when defendant confesses it there is no danger of perjury, which was the only thing the statute intended to prevent. Ch. Prec. 208. pl. 169. Mich. 1702, by the Master of the Rolls; Croyston v. Banes.

* If the agreement be set forth in the bill, and confessed in the answer, Chancery will decree a specific ex-

ecution; per Cur. But it was said, that in all cases where the Court had decreed a specific execution of a parol agreement, yet the same had been supported, and made out by letters in writing, and the particular terms stipulated therein as a foundation for their decree, otherwise it would never have decreed it. Ch. Prec. 374. pl. 260. Mich. 1713. Symondson v. Tweed.—G. Equ. Rep. 35. Limondson v. Sweed, S. C. in totidem verbis.

23. The plaintiff having a house in Monmouth-street, *agreed with the defendant for a piece of ground adjoining, to take a lease of him for as long time as he had in his house, and thereupon the plaintiff entered upon the ground, and built a vault, &c. for conveniency of his house, and when he had so done the de-*

Ibid. 281. pl. 352. cites S. P.

defendant

defendant refused to make him a lease, whereupon the plaintiff preferred his bill to have an execution of the agreement, that the defendant might make him a lease. The defendant pleaded the statute of frauds and perjuries, the agreement being only by parol, and no agreement in writing. His plea was over-ruled by the Lord Keeper, and the cause coming now to hearing before the Master of the Rolls, he decreed the defendant to perform the agreement, and to pay costs, and said the statute was not made to encourage frauds and cheats, and the plaintiff having laid out his money in pursuance of the agreement, and taken possession of the land, the defendant ought to execute a lease for as long time as the plaintiff had his house. 2 Freem. Rep. 268. pl. 337. Mich. 1703. Floyd v. Buckland.

24. A parol agreement was decreed, *possession being delivered* in pursuance of it. 2 Freem. Rep. 269. pl. 337. Mich. 1703. cites it as Butcher's case.

Ibid. 281. in pl. 352. cites S. P. decreed by Ld. Nottingham, because there was apparent fraud. —

S. P. cited accordingly. Ibid. 285. in pl. 356.

25. *A deed was sealed for security of money borrowed, and the deed being absolute, the defendant promised to seal a defeasance*, and afterwards refusing, a bill was preferred to compel him, and though he insisted upon the statute of frauds and perjuries, he was decreed to seal a defeasance, though there was no agreement in writing for that purpose. 2 Freem. Rep. 269. pl. 337. Mich. 1703. cites it as a case decreed by Ld. Nottingham.

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26. Sir Samuel Clarke being *seised in fee of the reversion* of the lands in question, *expectant upon the death of Margaret Mumfords*, who was *tenant for life*, made a lease for 500 years by way of mortgage, to commence upon the death of Margaret Mumfords. Afterwards William Whitmore agrees with Sir Samuel Clarke for the purchase of the reversion, and the term was assigned to the defendant William Whitmore, 16th May, and the fee was conveyed to William Whitmore, 17th May. In the conveyance of the fee the consideration is mentioned to be paid by John and William, but there was a concurrence of many other circumstances, whereby it plainly appeared that John Whitmore was only a trustee for William, and that the term was intended to attend the inheritance, but no declaration of trust in writing; and the defendant having denied the trust by his answer, the question was, whether any decree could be made by reason of the statute? In this case, though the Lord Keeper declared he was fully satisfied that it was intended a trust, yet there being no writing to declare it, he was not satisfied to do it in opposition to the very letter of the statute, unless they could shew him some precedents, and so took time to consider. 2 Freem. Rep. 280. pl. 352. Pasch. 1705. Sket v. Whitmore.

27. Though parol agreements are bound by the 29 Car. 2. cap. 3. and agreements are not to be *part parol and part in writing*, yet a *deposit or collateral security for the performance of the written agreement* is not within the purview of the statute, though there is no writing declaring such deposit to be a security; per Cowper C. 2 Vern. Rep. 617. pl. 555. Mich. 1708. Hales v. Vanderchem & Ux' and Cole.

28. A.

28. A. and B. being severally in a treaty about the purchase of a house and some land of C. they agree by parol, *that A. shall desist, and let B. purchase, and that B. shall let A. have such a part of the land at a proportionable price.* A. desisted accordingly, and B. purchased, but refused to perform the agreement. Decreed at the Rolls for the agreement, as an agreement *executed in part* by A.'s desisting; but per Cowper C. reversed, as being a parol agreement within the statute 29 Car. 2. cap. 3. 2 Vern. R. 627. pl. 559. Mich. 1708. Lammas v. Baily.

29. *Executory contract*, as lease for one year, and so from year to year, *quandiu*, &c. is not void by the statute of frauds, though it be for more than 3 years, because there is hereby no term for above two years ever subsisting at the same time. 2 Salk. 414. pl. 6. Hill. 7 Ann. B.R. Legg v. Strudwick.

30. An agreement *to a precedent act*, by a *subsequent deed*, will be good, notwithstanding the statute of frauds and perjuries; per Powell J. Holt's Rep. 735. Mich. 7 Ann. in case of Bushell v. Burland.

31. *The father purchases lands to him and his heirs, and when he was upon his death-bed sends for his eldest son, and tells him that these lands were bought with his second son's money, and that he intended to give them to him, whereupon the eldest son promised that he should enjoy them accordingly.* The father dies. The Ld. Keeper Wright and the Master of the Rolls held, that the eldest son ought to have these lands, because by the statute of frauds and perjuries, there ought to have been a declaration of the use or trust in writing; but Lord Chancellor Cowper was of another opinion, because of the fraud in this case, in that the eldest son promised the father, upon his death-bed, that the other should enjoy the lands, so he took this to be a case out of the statute, Mich. 7 Ann. Canc. Sellack v. Harris.

32. *A. enters into treaty with C. about a parcel of land, and so did B. A. meets B. and tells him, that if he would desist, and permit him to go on with his intended purchase he would let him a parcel of ground which he desired; accordingly to this B. agreed, and A. afterwards completed his purchase with C. then B. comes to A. and desires him that he would let him have the parcel of ground, to which A. answers, that now he could not, because it would be more convenient to him; and, says he, though I intended to let you have it, as the circumstances then were, yet my purpose, and my intentions, are now altered. B. brings a bill in Chancery to have a performance of this agreement. A. insists that he made no absolute promise, and sets forth such agreement as before, and also insists upon the statute, that there ought to have been an agreement in writing. At the hearing it was insisted, that for two reasons this was out of the statute: 1st, Because the plaintiff had executed one part of the agreement. 2dly, Because here was an agreement in writing, the agreement being set forth in the defendant's answer.* Lord Chancellor said, here is no absolute and positive agreement, but the words are ambiguous and uncertain, and the statute intended to oust as well

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all such ambiguous agreements as to prevent perjuries, &c. and this agreement will not bind unless it were in writing. Mich. 7 Ann. Anon.

Wms. Rep. 33. A marriage settlement was explained by articles precedent.
123. Trin. 2 Vern. 658. pl. 584. Trin. 1710. Honour v. Honour.
1710. S. C.
—: Vern. 218. Spoke v. Spoke, S. P. ——— See tit. Marriage (E. a), per tot.

34. A father encourages the courtship of his son with another's daughter, who proposes by letter to give her 500 l. if the father would settle 100 l. per annum on the son, which is refused. The son and daughter marry privately, and after this letter is written; then he, that refused, consented; and he, that consented, refused. On a bill for performance of this agreement it was objected, that these promises were within the statute of frauds, and that the letter being after the marriage should not bind; but decreed contra on circumstances of the father's privity and consent to the match and of the marriage, by afterwards approving of it. That it was out of the statute if no letter for the agreement is admitted by the answer; but this case doth not depend on parol evidence or admissions; for the letter after marriage, considering the transactions before, is sufficient. The offer to settle 100 l. per ann. shall be in tail, with a power to the husband to charge it with 500 l. for younger children, being the mother's portion, and decreed accordingly; per Harcourt Lord Keeper. 1712. Hodgson v. Hutchenfon.

35. A steward has a general authority to make contracts with the tenants, &c. but this will not bind the lord without his consent and approbation, or unless part of the bargain is actually executed; per Lord C. Cowper. Pasch. 3 Geo.

Wms. Rep. 36. A distinction was taken and agreed by the Court, that
618. pl. where upon a treaty for marriage, or any other treaty, the parties
180. Pasch. come to an agreement, but the same is never reduced into writing,
120. Lady nor any proposal made to reduce it into writing, so that they
Montague rely wholly on their parol agreement, that if this be not executed
v. Sir Geo. in part, neither party can compel the other to a specific performance.
Maxwell, But if there was an agreement to reduce it into writing,
S. C. which but that is prevented by the fraud, or practice of the other party,
see at tit. the Court will relieve. As where instructions are given and
Marriage preparations made for the drawing of a marriage-settlement,
(W), pl. 11. and before it is completed, the woman is drawn in by the assurances and promises of the man to perform it to marry him; per
Ld. Macclesfield. Ch. Prec. 526. pl. 323. Mich. 1719. Sir
George Maxwell v. Lady Montague.

S. P. cited
as decreed by
Lord Nottingham, on
the fraud
after the
statute. Chanc. Prec. Mich. 1719. in case of Sir Geo. Maxwell v. Lady Montague.
37. A feoffment was made, and the feoffee promised to make a
defeasance, which promise was by parol and not in writing, yet
decreed a good promise within the statute; per North K.
Skin. 143. cites it as ruled in Lord Chancellor Finche's time.

38. W. leased an house to N. for eleven years, and was to allow
20 l. to be laid out in repairs; the agreement was reduced into
writing

writing signed and sealed by both parties; *N.* repaired the house, and finding it to take a much greater sum than the 20 l. told *W.* of it, and that he would nevertheless go on, and lay out more money, if he would enlarge the term to twenty-one years, or add fourteen, or as many as *N.* should think fit. *W.* replied, * that they would not fall out about that, and after declared, that he would enlarge the term, without mentioning any term in certain. *Quære*, Whether this new agreement made by parol, which varied from the written agreement, should be carried into execution notwithstanding the statute of frauds? Master of Rolls said, that before the statute written agreements could not be controuled by a parol agreement contrary to it, or altering it; but *this is a new agreement, and the laying out the money is a performance on one part, and ought to be carried into execution*, and built his decree upon these cases: 1st, Where a parol agreement was for a building lease, and before it was reduced into writing the lessee began to build, and after differing on the terms of the lease, the lessee brought a bill and the lessor insisted on the statute of frauds. The Lord Keeper dismissed the bill, but the plaintiff was relieved in *Dom. Proc.* and the second was a case in Lord Jefferies's time. *MS. Rep. Mich. 4 Geo. Canc.*

39. *A. agrees with B.'s broker for 5000 l. South-Sea Stock, the broker, according to usage, made an entry of this agreement in his pocket-book.* The defendant pleaded statute of frauds, that no contract can be good unless reduced into writing. Lord C. Cowper seemed of opinion that the plea was good, and said that it had been so held in many other cases; but on looking into the plea he found, that he had barely pleaded the statute, without adding, that this agreement was not reduced into writing as he should have done, and so had not brought his case within the statute; and therefore the plea was over-ruled. *Chan. Prec. 533. pl. 328. Trin. 1720. Muffell v. Cook.*

40. *Where the statute of frauds has been used to cover a fraud, the Court has always relieved.* The 1st case in Lord Nottingham's time, where there was an absolute conveyance and a defeasance, which defendant would not execute, but insisted on the statute, and it was over-ruled. Next in Lord Jeffrey's time, where putting the party into possession was such an execution of the agreement in part as was good against a subsequent purchaser; so where one stands by, and sees the party lay out his money in building on the defendant's ground, he was bound thereby. The bill here was to have a lease according to the defendant's promise, plaintiff having laid out money in the premises, and the defendant insists on the statute, there being no agreement in writing, nor any certain terms agreed upon, and says what plaintiff laid out was not on lasting improvements, but admits plaintiff built a stable which cost him about 10 l. It was proved, that defendant told the plaintiff his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor said, that the defendant is guilty of a fraud, and ought to be punished for it, and so decreed a lease to the plaintiff, though the terms were uncertain,

uncertain, it is in the plaintiff's election for what time he will hold it, and he doth elect to hold during the defendant's term, at the old rent, and plaintiff to pay costs. Mich. 5 Geo. Canc.

41. Where a man on *promise of a lease* to be made to him, *lays out money on improvements*, he shall oblige the lessor afterwards to execute the lease, because it was executed on the part of the lessee; besides the lessor shall not take advantage of his own fraud to run away with the improvements made by another; but *if no such expence had been on the lessee's part*, a bare promise of the lease, though accompanied with possession, as where a *lessee by parol agreed to take a lease for a term for years certain, and continued in possession on the credit thereof*, yet there being no writing to make out this agreement, it is directly within the statute. Chan. Prec. 561. pl. 344. cites it as held by the Master of the Rolls. Mich. 1720. in case of Smith v. Turner.

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42. *A. agrees with B. for the purchase of nine houses, which were in mortgage to J. S. and pays him a guinea in earnest. B. writes a note to J. S. and desires him to deliver up the writings he having disposed of them, which J. S. refused, unless the mortgage-money was paid him down, and afterwards purchases them himself; on a bill brought by A. for a specific execution of the agreement it was held, that neither the guinea paid down, nor the note (which was only an evidence of assent, but did not ascertain the terms of the agreement as to what sum was to be paid, nor to whom the houses were to be disposed of, nor whether by way of sale or assignment, or lease, and so all the danger of perjury, which the statute was to provide against, would be let in to ascertain this agreement) were sufficient to take it out of the statute of frauds and perjuries.* Chan. Prec. 560. pl. 344. Pasch. 1721. Seagood v. Meal and Leonard.

43. Where there is a parol agreement for a lease, and the lessee by virtue of such agreement *enters and builds*; this Court will establish it on the foot of *fraud in the lessor*, notwithstanding the statute of frauds, &c. because contracts executed in part are not always within the statute; though *executory contracts* are. Per Cur. 9 Mod. 37. Trin. 9 Geo. in case of Savage v. Foster.

S. P. cited
per Lord
Maccles-
field. Chan.
Prec. 526.
to have been
decreed in
Ld. Nottingham's time.

44. A. made an absolute mortgage to B. (which was the old way of mortgaging estates); B. the mortgagee *promised to make a defeasance*, and the Court decreed B. to make it, notwithstanding the statute of frauds. Cited Arg. 9 Mod. 88. Hill. 10 Geo. in Canc. in case of Hosier v. Read.

45. Appeal from the Rolls upon this case. Henden enters into a *contract in writing with the plaintiff for the purchase of a college lease*; the plaintiff agrees to renew the lease in the name of Henden, or such person as he should nominate and appoint. Henden directs the plaintiff to renew the lease in the name of Cox, and declares he bought it for him as his agent; the plaintiff brings the bill against both for the residue of the purchase-money. Decree at the Rolls was against both defendants to pay the money, and in case Hen-
don

don should pay it, then he to be at liberty to prosecute the decree in the name of the plaintiff against the other defendant Cox, who was the principal. The defendant Cox appeals, for that he did not give any authority in writing to the other defendant Hendon to buy it for him, and therefore per stat. 29 Car. 2. of frauds he ought not to be bound by the contract. Macclesfield C. affirmed the decree, for that the *authority to treat or buy for him may be good without writing, though the contract itself must be in writing*, by the statute of frauds. MS. Rep. Mich. 10 Geo. in Canc. Waller v. Hendon & Cox.

46. It was made a question, and laid before all the judges of England, whether a *contract for stock* be within the statute of frauds, which mentions goods, wares and merchandizes so as to require the contract to be in writing, or money to be paid in earnest, and they were equally divided thereupon; said per Ld. C. King. 2 Wms.'s Rep. 308. Mich. 1725. in case of Colt v. Nettervill.

Comyns's
Rep. 354.
Mich.
7 Geo. 1.
PICKER-
ING v. AP-
PLEBY,
S. P. on a
trial before
Ld. Ch. J.

King, who doubting, it was argued before the court of C. B. and afterwards at Serjeant's Inn, before all the judges of England, but the judges being divided in opinion, it was adjourned. — The Court said, that it had been determined here, that bargains *relating to stock* are within the statute of frauds, and if earnest is not given, are *nuda pacta*. Sel. Cases in Canc. in Ld. King's Time. 41 Trin. 11 Geo. Crull v. Dodson.

47. Bill for a specific performance of a *promise* by defendant to procure plaintiff to be made deputy to defendant's son as clerk of the house of peers, or otherwise to provide for plaintiff in consideration of plaintiff's insisting upon and soliciting in procuring a reversionary grant of that place for defendant's son, which defendant now enjoyed, &c. Defendant pleaded the statute of frauds and perjuries, and that the promise was not in writing, nor to be performed within one year; and also the statute of limitations, that the promise was made above six years before the bill filed. Per Cur. the plea allowed in both respects, and held, 1st, That a *parol promise to be performed upon a contingency which may or may not happen within a year after the making*, is void within the statute of frauds. 2dly, And so, if made above six years before the bill or action brought, is barred by the statute of limitations, though the contingency or time of performance happens within the six years. MS. Rep. Trin. 1726. in the Exchequer. Reynolds v. Spencer Cowper, Esq.

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48. Bill was brought for specific performance of covenants. The plaintiff sold the defendant a copyhold estate of the yearly value of 16l. (on which was timber to the value of 150l.) for 630l. and covenanted to surrender on or before Michaelmas then next; the defendant paid 10s. in part of the purchase, entered on the premises, cut down timber, stocked the land, and did every thing as owner. The plaintiff proved he gave notice in writing that he would surrender next court day, and attended accordingly. On the defendant's part there were several proofs that he was disordered in his senses, and though there be proof that the timber was of the value of 150l. yet as no custom is alleged of the tenant's having power to cut it down, it must be according to the common

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law, by which the tenant has no power over it, and therefore a plain imposition. The Chancellor was of opinion it was a great *over value*, and that his cutting down of timber was a convincing proof of his folly, because a direct forfeiture; but as it is, it is a matter merely at law; the covenant is to surrender at or before Michaelmas, you say you were ready at the next court, which does not appear to have been before Michaelmas; if surrender had been, action would have lain at law. Bill dismissed. Sel. Cases in Canc. in Ld. King's Time, 3. Mich. 11 Geo. Edwards v. Heather.

(I) Executed in Part. By 29 Car. 2. cap. 3.

1. A Parol agreement for the sale of a house, and 20 s. paid, was decreed without further execution proved; and the Master of the Rolls said, that *he should have demurred on the bill*; but having now proceeded to proof, he would decree it, and so he did. 2 Freem. Rep. 128. pl. 154. Hill. 1670. Anon.

2. A. agreed with B. for the purchase of an house for 290 l. to be paid, and paid 20 s. in hand, and tendered the rest at the day, and was relieved. 3 Chan. Rep. 28. Mich. 21 Car. 2. at the Rolls, Voll v. Smith.

3. Articles of agreement for a purchase being performed in part, decreed a specific performance of the whole, the master to settle the conveyance, and the purchaser to give security for the remainder of the purchase money. Fin. R. 20. Mich. 25 Car. 2. Foster v. Elves & al'.

[526] 4. A. sold houses to B. for 2000 l. A note was made by A. of the agreement signed by B. but not by A. It was objected, that the note binds not A. who did not sign it, and that by the statute of frauds, &c. and therefore in equity cannot bind the other party; because either both must be bound, or neither of them, in equity; but decreed the contrary. 2 Chan. Cases, 164. Trin. 36 Car. 2. Hatton v. Grey.

5. A. by parol agrees to grant a lease to B. A lease is drawn and corrected by B.'s counsel, and afterwards ingrossed and executed by A. B. pleaded the statute of frauds, that he had signed no agreement in writing, the words of the act being, that it must be signed by the party that is to be bound by it. North K. ordered B. to answer, and to save the benefit of the plea to the hearing. Vern. R. 221. pl. 220. Hill. 1683. Lowther v. Carrill.

6. Administrator and her two children being intitled to a lease of a house, agree to make a lease for 10 years. The administrator, with the privy of the other two, executed the lease. The statute of frauds is no plea for the other two; per Ld. K. North. Vern. 210. pl. 207. Mich. 1683. Heyter v. Sturman.

7. In a case where no interest may pass by a parol agreement, yet if the person enjoys according to such agreement, an action lies for

For the money upon the other's agreement, as in the case of an agreement for enjoyment of tithes for 6 years. Skin. 113. pl. 4. Trin. 35 Car. 2. B. R. Eaton v. Sherwin.

8. A settlement was made on the wife in marriage, in pursuance of articles in writing sealed; if it after appear to be deficient, it shall be made up by the heir; but if it had been only upon a parol agreement, or if at the time of the settlement the lands had been of full value, and after by accident had gone less, there had been no relief. Skin. 158. Hill. 35 & 36 Car. 2. Speak v. Pedley.

9. A parol agreement for a purchase of land, and possession delivered, decreed by Jefferies C. to be executed against a subsequent purchaser, with notice to whom a conveyance was made, and who had thereupon paid his money. Vern. R. 363. pl. 357. Hill. 1685. Butcher v. Stapely and Butcher.

In this case there was a note in writing, but not signed by either party, containing the heads of the agreement. Ibid. — An agreement, though not in writing, if executed on one part, has been always looked upon so far conclusive, as to induce the Court to decree an execution on the other part; per Ld. Macclesfield. Ch. Prec. 518. pl. 320. Trin. 1719. Lockey v. Lockey.

10. Articles for the purchase of lands were signed, but not sealed, but the plaintiff was put into possession of some part. The Court decreed an execution, and Ld. Commissioner Rawlinson said, that agreements in writing, though not sealed, have some better countenance since the statute of frauds and perjuries than they had before. Ch. Prec. 16. pl. 16. Hill. 1690. Wheeler v. Newton.

11. If A. says to B. *I will give so much for your horse*, and B. agrees to take it, if nothing more passeth between them, and no earnest is given, and they depart from one another, this in point of evidence is not to be taken but as a naked communication, and so is D. 30. [pl.] 203. & 14 H. 8. 22. Per Holt. Ch. J. in delivering the opinion of the Court. Lutw. 252. Hill. 8 W. 3. in the case of Thorpe v. Thorpe.

12. A. at a public sale of estate, offered 1250 l. for the purchase, which was accepted and agreed to, and conveyances directed to be made, and possession actually delivered, but disputes arose about settling the conveyances. Wright K. decreed A. to proceed in the purchase, in case he could have a good title, and for that purpose referred it to a master. 2 Vern. 455. pl. 417. Hill. 1703. Pyke v. Williams.

13. A. pursuant to a parol agreement for a building lease of Wild-House, proceeded to pull down part, and build part, but before any lease executed, the owner of the soil died. Defendant's representatives knew nothing of the matter, and insisted on the statute of frauds, &c. and the Lord Keeper dismissed the bill; but on appeal to the lords in parliament, that dismissal was reversed, and a building lease decreed; * cited 2 Vern. 456. Hill. 1703. in case of Pyke v. Williams, as the case of † Foxcraft v. Lister.

Ibid. ci ca also the case of Burcher v. Butcher. — S. P. per Cur. 9 Mod. 37. — When the lessor was dying, he declared that he thought he was bound in conscience to have made a lease in writing, and the heir declining him not to discompose himself, promised that he would supply it. S. C. cited G. Equ. Rep. 11. — S. C. cited G. Equ. Rep. 4. † S. C. cited Chan. Prec. 519. and 526.

1 Salk. 113.
pl. 2. S. C.
accordingly
by Holt Ch.
J. at nisi
prius at
Guildhall.

1 Salk. 113.
pl. 2. S. C.
accordingly;
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1 Salk. 113.
pl. 2. S. C.
& S. P. by
Holt Ch. J.

14. Earnest is only to bind the bargain, and a demand of goods without tender of the money is void, because it is not pursuant to the intent of the bargain. 6 Mod. 162. Pasch. 3 Ann. Langford v. Administrator of Tyler.

15. After earnest given the vendor cannot sell to another, but if vendee does not come to pay and take the goods, vendor ought to request him to come and pay, and if he comes not in convenient time, the agreement is dissolved, and then he may sell. 6 Mod. 162. Pasch. 3 Ann. B. R. Langford v. Tyler.

16. Notwithstanding the earnest the money must be paid upon fetching away the goods, unless there is express agreement that payment is to be made at a certain time. 6 Mod. 162. per Holt Ch. J. Langford v. Tyler.

17. The provost and scholars of King's College in Cambridge, being seised in fee of the tithes of Priors Quarter in Tiverton in com. Devon cum pertinentiis, did by a deed dated 15 July, 1699, demise the same to Eliz. Duck, widow, for 21 years under several other covenants and rents, &c. And afterwards the said Mrs. Duck, by articles dated the 23d June, 1704, between her of the one part, and Mr. Upcot of the other part, did covenant and promise to convey to the defendant Upcot, his executors, and assigns, the said portion of tithes cum pertinentiis, during her estate and interest therein unexpired at Michaelmas then next following, and there were several other covenants and reservations about the payment of the rents, and providing for the college-officers; and the said Upcot was to give in consideration of this 350 l. The plaintiff, Coleman, who had formerly been in treaty with Mrs. Duck for these tithes, hearing the defendant had articulated for them with her, applied himself to the defendant, and after several treaties, which proved to be ineffectual, the defendant sends his son, William Upcot, and Mr. Frost, and Mr. Barton, with a letter to the plaintiff's house, dated 20th September, 1704, wherein the said defendant said, that if she parted with the said tithes, it should be on certain conditions following, (viz.) that the plaintiff should pay the defendant 150 l. when he relinquished his right, and executed his agreement with Mrs. Duck; that the plaintiff should quit all pretences of tithes which the plaintiff or his son London should or might claim in the park lying within the said quarter of Tiverton, and pay no more than formerly per acre for the tithes, or venison, and pay only 10 s. per ann. in lieu of tithes or justment for his 8th part in West Barton, and that the defendant would have the plaintiff's right in the seat in the church where his son London's family sit, and unless the plaintiff would take it upon these terms, he would not part with it; and if the plaintiff parted with it, the defendant was to have the refusal, and would be obliged to take it within a year upon the same terms. This letter was directed to the plaintiff, and brought to his house by the defendant's son, who came thither with two other persons, and as soon as the plaintiff had perused the letter, he
accepted

accepted of the terms in the said letter; and the son went home and acquainted his father with it, and the next day sent his attorney to acquaint the defendant with it, and to request from him a copy of Mrs. Duck's articles (the original being lodged in the hands of a friend), who accordingly delivered them to the said attorney, and appointed a day for the executing the same, and the receiving of the 150 l. but on some pretence he appointed the day after that, and on the Monday went to Mrs. Duck (who had also notice of the defendant's agreement with the plaintiff, by the plaintiff's order) and settled a conveyance from Mrs. Duck to himself.

N. B. The letter was not subscribed by Mr. Coleman, till 3 or 4 days after his accepting of the bargain, and was afterwards stamped, paying the 5 l. penalty.

My Lord Keeper decreed the defendant to perform this agreement, for that it was directly within the statute of frauds, as being an agreement signed by the party to be charged with the same, and there was no need of its being signed by both parties, and the plaintiff by his bill hath submitted to perform what was required of his part to be performed. *If a man (being in company) makes offers of a bargain, and then writes them down, and signs them, and the other party takes them up, and prefers his bill, this shall be a good bargain,* and the party shall be compelled to a specific performance of it. This, though it was not at first a contract, but conditionally only, if the other would accept of it, yet when the other had accepted of it, it was all one, and the defendant intended it so by his sending his son with the letter, and two persons besides. MS. Rep. Hill. Vac. 5 Ann. Coleman v. Upcor.

18. Wherever a parol agreement is begun to be put in execution, and intended to be continued, there though there be no writing, yet this Court will enforce the execution thereof, notwithstanding the statute of frauds and perjuries; per Ld. Cowper. G. Equ. B. 4. Hill. 6 Ann. in Canc. in case of Ld. Guernsey v. Rodbridges.

19. A. bought goods of B. to the value of 500 l. but not having money ready to pay, *proposed to mortgage land to secure the money,* and in order thereto, *A. left the title deeds with B. to get an assignment drawn,* who carried the deeds to an attorney to inspect the title, and draw the assignment, and after some time the attorney died without drawing the mortgage. Then B. carried them to a scrivener for the same purpose, but *before the mortgage was perfected A. became a bankrupt.* Decreed the deeds to be delivered up by B. to the assignee of the bankrupt. Ch. Prec. 375. pl. 261. Mich. 1713. Brander v. Boles.

But note, no reason was given for this decree. Ibid.

20. A. the plaintiff agreed to sell B. the defendant a house for 640 l. and by consent of A. and B. an attorney drew a conveyance, and sent it to B. who made several alterations, and gave it back to be ingrossed, whereupon a time was appointed for A. and B. to meet and for B. to pay the money. A. and the attorney came to the place appointed, and executed the conveyance, and got the same registered, and then brought his bill to compel B. to pay the money.

It was insisted, that B.'s altering the draught with his own hand could not be called a signing, and that had he wrote over the whole deed with his own hand, without signing it, it had not been sufficient, and cited the case of *ITHEL v. POTTER*, determined at the Rolls, Trin. 1719, on the very same point. And Lord Chancellor said, that unless in some particular cases where there has been an execution of the contract, by *entering upon and improving* the premises, the party's signing the agreement is absolutely necessary for the completing it, and to put a different construction upon the act, would be to repeal it; and as to the registering the deeds, he thought it immaterial as to binding B. And his lordship laid great stress on what the defendant mentioned in the answering part, wherein B. swore that it was agreed on [529] between A. and him, that B. might be off at any time, on paying the charge of preparing the writing which B. said he was willing to do. Wms.'s Rep. 770. pl. 221. Mich. 1722. *Hawkins v. Holmes*.

21. An agreement, though *executed in part*, yet being afterwards by an act of parliament rendered impossible to be performed, shall not prejudice any person. 8 Mod. 51. Trin. 7 Geo. 1. *Winnington v. Briscoe*.

22. Some heads of a lease agreed upon were taken by an attorney in writing, but upon proof that some other were omitted which were agreed upon between the parties at the same time, it was decreed that those clauses should be put into the lease, notwithstanding the statute of frauds, which was strongly insisted upon; Arg. 9 Mod. 88. Hill. 10 Geo. 1. in Canc. in the case of *Hofier v. Read*, cites it as the case of *Jones v. Sheriff*.

(K) Pleadings.

1. **I**N trespass upon the case, the opinion of the Court was, that if a man declares that the defendant took upon him to make a mill by a day, and did not, the declaration is not good, because it is not declared what he should have for his labour, and the reason seems to be inasmuch as otherwise it is *nudum pactum* unde non oritur actio; quod nota. Br. Contract, pl. 5. cites 3 H. 6. 36.

2. Notwithstanding a contract may be upon condition, yet in debt the party shall not traverse the contract, because he may wage his law. Br. Contract, pl. 7. cites 33 H. 6. 43.

3. In debt upon a contract, if the defendant says that it was made upon certain condition at another place in the same county, the plaintiff may say, that it was made simply without condition, prist, without traversing the place, because it is in one and the same county; but if the condition be made in another county, there he shall traverse that it was not made simply where the plaintiff counted, and the like order shall be in detinue of chattels, said by Needham that it was adjudged the last term, quod nemo negavit, and so see contract traversable, which is in effect a mesne conveyance, where he might have waged his law. Br. Traverse, per, &c. pl. 30. cites 34 H. 6. 42.

4. Debt

4. *Debt upon a retainer in husbandry for his salary arrear; the defendant said, that he did not retain him in husbandry, and a good plea, by reason that he cannot wage his law in this case, and therefore he may traverse the contract; quod nota bene.* Br. Contract, pl. 20. cites 38 H. 6. 22.

5. *A prior retained a servant who served the house, the prior died. The successor shall be charged, though the salary was more than is warranted by the statute; and per Danby, his count is good, though he did not say by whom he was retained, nor whether he did his service or not. Quære of the retainer.* Br. Contract, pl. 37. cites 3 E. 4. 21:

6. *Debt, because the plaintiff had the feme and son of the defendant at board, and let to the defendant a chamber for the feme and son, rendering for the chamber and boarding 6s. a week; and the defendant said, that the plaintiff did not let the chamber, and by the best opinion it is a good answer to all; for destroying the contract in part, is destroying it in all; for it is a thing intire.* Br. Barre, pl. 39. cites 9 E. 4. 1.

7. *In debt against B. upon a contract he said, that the contract was made by him and one C. who is alive not named; judgment of the writ; by which the writ abated.* Br. Brief, pl. 217. cites 9 E. 4. 24. [530]

8. *Action upon the case of bargain of certain land for money paid before-hand, and after he infeoffed a stranger contrary to his bargain; the defendant said, that he sold to the plaintiff upon condition he should pay to him 10 l. such a day, and per Cur. there he ought to traverse, absque hoc that it was sold for so much money paid before-hand, prout, &c. For when the plaintiff falsely recites his bargain, it suffices for the defendant to traverse it.* Br. Traverse, per, &c. pl. 248. cites 16 E. 4. 9.

9. *But Brooke says it seems, that if the bargain be declared single, the defendant may shew that it was upon condition without traverse.* Br. Ibid.

10. *Debt, and counted of a lease of a chamber and certain beds to the defendant, and that he shall be at table with the plaintiff for a certain time, paying 20s. by the week for all, and counted that it amounted to 10 l. &c. The defendant said, that as to the chamber and bed non dimisit, and found for the plaintiff, and alleged in arrest of judgment, that this is jeofail, because he did not answer to the boarding; and upon good argument it was held that the contract false in parcel is false in all, and therefore the plea good, quod non dimisit parcellam, &c. and therefore the plaintiff recovered by award, But Brian was strongly against it, and the justices of B. R. in coming from Westminster said, that it was jeofail. And per Brian, the issue ought to have been nihil debet prout, &c. and give his matter in evidence; but all the other justices of C. B. were against Brian, and it seems to be good reason that it shall be a good plea; for otherwise the plaintiff, by false declarations, (where the contract was only for boarding) may, by the adding the lease of the chamber, oust the defendant of his law without just cause; quod nota.* Br. Dette, pl. 170. cites 21 E. 4. 28.

11. In debt the defendant may *traverse* part of the contract of the thing of which the defendant cannot wage his law. Br. Contract, pl. 28. cites 21 E. 4. 28.

12. It was said arguendo, that in debt, if the plaintiff counts of buying of a horse in the county of Middlesex for 20 s. and the defendant says, that he bought it in London upon condition, and shewed the condition performed, absque hoc that he bought it in the county of Middlesex, prout, &c. and a good plea; quod omnes concederunt. Br. Traverse, per, &c. pl. 261. cites 21 E. 4. 29.

See tit. Apportionment.

13. If one retains a servant to serve for a year, for a salary of 20 s. there if the servant demands the 20 s. he ought to shew that the time is past, viz. that the year is expired, and ought to plead it certainly; because his action is given in respect of the year past, and of the thing done in time, and the time is parcel of the cause of the demand, and precedes the demand. Pl. C. 26. b. cites Mich. 20 H. 7. 12. by Rede J.

14. Action for breach of covenant in a deed; defendant pleads parol agreement, afterwards in discharge of the former covenant, but the Court held the plea not good, and took these differences; that a parol agreement, before breach of it, may be discharged by parol, and so pleaded; but after breach it cannot be pleaded in discharge without satisfaction also pleaded; but a discharge may be pleaded by deed, be the covenant by parol or by deed after a breach, and without satisfaction. Sty. 8. Hill. 22 Car. B. R. Fortescue v. Brograve.

15. He that will have the benefit of a mutual agreement, must shew that he has done his part. MS. Tab. March 28, 1727. Ducheſs of Hamilton v. Duke Hamilton.

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(L) Decreed.

1. A Draught of an agreement before commissioners decreed, notwithstanding the defendant refused. 11 & 12 Eliz. Toth. 65. Pope v. Mafon.

2. Though an estate cannot be created by covenant by law, yet it will be made good in equity. Toth. 147. cites June 40 Eliz. Prince v. Green.

3. The defendant promised and agreed to assure leases in marriage with the plaintiff's daughters, who would not perform it, but ordered. Toth. 260, cites Long v. Long. 40 Eliz. li. A. fo. 360 or 369.

4. A man promised to assure lands in consideration of marriage, but after the marriage refuseth, yet ordered. Toth. 260. cites Gerard's case in 2 Jac. li. A. fo. 202.

5. Where the law cannot give a lease, or a thing promised, but damage, there is some cause for the Court to compel the party to perform the thing promised. Toth. 259. cites Brown v. North, Waller v. Salter, Trin. 8 Jac. li. A.

6. The defendant promised to sell the plaintiff land, whereof 10 s. was given him, yet the defendant would not perform, yet he should,

should. Toth. 260. cites *Ferne v. Bullock*. Mich. 9 Jac. li. A. fo. 274.

7. The defendant promised his father, to assure certain copyhold lands to the plaintiff, but the father dying before any surrender, he denied to assure the same, yet decreed he should. Toth. 261. cites 21 Maii, 9 Jac. *Paile v. Paile*.

8. Upon a promise made by the defendant to convey his lands unto the plaintiff, was the cause of his marriage, but when the said defendant came to be old, he conveyed away the same lands from the plaintiff, contrary to his promise. The plaintiff was relieved for part of the said lands. Toth. 260. cites 13 Jul. 11 Ja. *Otway v. Hibblethwaite*.

9. A promise of 500 l. to make himself a baronet, but would not pay it. Toth. 261, 262. cites *Ruffel v. Read*; yet decreed about 5 or 6 Car.

10. A. purchases land of B. at 4320 l. A. after agrees, that on B.'s abatement of 420 l. of the 4320 l. he would re-convey whenever the king, and dean and chapter were restored. B. made the abatement. Decreed against the son of A., A. being dead, though it was objected, that it was only in nature of a wager, and the consideration unequal and penal; and that an action more properly lay. Chan. Cases, 42. Hill. 14 Car. 2. on appeal from a decree at the Rolls. *Parker v. Palmer*.

11. Promise to deliver up a bond upon a condition, which was afterwards performed; decreed to deliver up the bond, though the thing done did not amount to the sum due. N. Ch. R. 128. 21 Car. 2. *Bootle v. Sanctry*.

12. Sale of fourteen shares out of thirty-six shares in the New-River water, which thirty-six shares were charged with a rent of 500 l. per ann. to the crown in fee, and 100 l. per ann. to H. M. for life. And Sir Hugh in his agreement with B. had covenanted to discharge the fourteen shares he had agreed to sell B. from those rents. Decreed that the plaintiff should enjoy the fourteen shares discharged of those rents, and that the other twenty-two shares should be subject to the plaintiff's indemnity therein, notwithstanding it was insisted that Sir Hugh's covenant to discharge the fourteen shares of those rents was merely personal, and did not nor could charge the whole rents upon the twenty-two shares. Chan. Cases, 208. 212. Trin. 23 Car. 2. *Lord Cornbury v. Middleton*.

13. The remedy of an agreement ought to be reciprocal; per [532] *Windham J.* Chan. Cases, 209. Trin. 23 Car. 2. *Lord Cornbury v. Middleton*.

14. A widow agrees to accept 100 l. per ann. for her jointure, when by marriage articles she was to have 300 l. per ann. The Court decreed the agreement. Fin. R. 128. Mich. 26 Car. 2. *Norcliff v. Worfeley*.

15. A. having made a bill of sale, and confessed a judgment to B. for securing rent, agreed afterwards with B. to deliver up the bill, and acknowledge satisfaction on the judgment, if C. would be bound with B. to A. for payment, which was done accordingly,

but

Contract and Agreement.

but B. died before he had performed his part. Decreed that the administrator of B. deliver up the bill of sale, and acknowledge satisfaction on the judgment. Fin. R. 300. Pasch. 29 Car. 2. Love v. Hawkes.

16. A *voluntary* agreement is not obliging in equity, unless the whole be performed. Chan. Cases, 302. Mich. 29 Car. 2. Butcher v. Hinton & Short.

17. An agreement *between creditors of a bankrupt* decreed to be performed. Fin. R. 326. Mich. 29 Car. 2. Ebsworth and Mansell v. Kent & al'.

18. Lessee of a term agrees in consideration of money paid, and more to be paid, *to sell his term to A., A. procuring a licence of lessor and demising the land to B. for life.* A. instead of a licence took a new lease of the lessor for the same lives, and by bill sets forth that he is ready to make the demise to B. and pay the rest of the money. Decreed the agreement to be performed, and the lease to be made to B. and B. to execute a counter-part. Fin. R. 420. Pasch. 31 Car. 2. Wallenger v. Greenfield & Norris.

19. In case of an *unreasonable* agreement, though reduced into writing but not sealed, as to give in marriage with one daughter more than would be remaining for the father, (who was in debt,) and two other daughters, and the mother. Ld. Chancellor would not decree the same, but if the plaintiffs could recover at law he would leave them to the remedy, and it was referred to the parties to agree amongst themselves, else to attend again. 2 Chan. Cases, 17. Hill. 31 & 32 Car. 2. Anon.

20. A. agreed *to sell land* to B. and received 210 l. *of the purchase money*, and the residue was to be paid on executing the conveyance such a day. But at the day the writings were not ready though the money was; and A. telling B. he could have 100 l. more for the land if B. would *consent to quit it to C.* and that then *A. would pay back to B. the 210 l.* with interest, to which B. consented, and C. promised to become B.'s paymaster, if B. could procure A.'s order for that purpose; but A. refusing to give such order, B. brought his bill to compel him. Decreed that C. pay the same. Fin. R. 456. Trin. 32 Car. 2. Farmer v. Marston.

21. A. sells part of a ship to B. and made a bill of sale of it, and B. gave *bond for the money.* *A. snatches away the bill of sale*, and said he would keep it till B. had paid the money. B. requested a bill of sale, but A. refused. However, *B. took possession* of the ship, and went a voyage with her; at the return A. offered to give B. a bill of sale, which B. then refused, and now *sues to have up his bond*, though he had not paid the money. Finch C. decreed the bond to be delivered up to B. and B. to re-assign the part of the ship; because when A. had security he ought on demand to have made assurance. 2 Ch. Cases, 5. Mich. 32 Car. 2. Legate v. Hockwood.

22. If a man buys lands and secures the money, if he who sells will *not make assurance* when reasonably demanded, he shall lose

lose the bargain, and bond decreed to be delivered up. 2 Chan. Cases, 6. Mich. 32 Car. 2. in case of Legate v. Hockwood.

23. A promise or agreement by *feme sole* to avoid a law-suit, that if she died without issue she *would leave* 7. S. 500 l. or the land. She marries and devises the land to her husband, and dies. Decreed that the agreement be *executed*. Vern. R. 48. Pasch. 1682. Goilmere v. Battison.

24. Where first *purchaser* pays not money according to articles, a *second purchaser* shall be admitted, though he had notice. 2 Chan. Cases, 121. Trin. 34 Car. 2. Barebone v. Barnes.

25. Where a *parol agreement* is consistent with, and does not contradict the deed, you may sue at law; per Lord Keeper, and refused to grant relief. 2 Chan. Cases, 143. Trin. 35 Car. 2. Foot v. Salway & al'.

26. A contract which carries an equity to have it decreed in specie, *ought to be without all objection*; per Ld. K. North. Vern. 272. pl. 268. Mich. 1684. in case of Johnson v. Nott.

27. A person indebted by bonds, and failing in the world, applies to the *scrivener* of the obligees, to know where they lived, to apply to them for a composition; but the scrivener not telling him, but pretending the obligees were absolutely under his direction, *undertook to compound for 10 s. in the pound*, which was more than other creditors received. The debtor paid some money, and tendered the rest according to the agreement, but the *obligees would not stand to the agreement*. The scrivener refused to deliver up the bonds. On a bill by the debtor it was decreed, that he pay to the obligees their principal, interest, and costs, and that the scrivener should repay what the plaintiff should so pay, and *indemnify* the plaintiff according to the agreement; per Lds. Commissioners. 2 Vern. 127. pl. 126. Hill. 1690. Parrot v. Wells & Clerk.

28. A. makes a *voluntary settlement* on B. who afterwards agrees to deliver it up without any consideration. This agreement will be decreed in equity; for by Ld. Keeper, a voluntary settlement may be surrendered without consideration, and decreed a reconveyance. Chan. Prec. 69. pl. 62. Hill. 1696. Wentworth v. Deverginny.

29. Chancery will not *alter or amend* the agreement of the parties. Chan. Prec. 89. Hill. 1698. Warrington v. Langham.

30. *Bond to transfer* 300 l. East India stock on or before September 30 next. The stock was much risen in value since the agreement, yet the defendant was decreed to transfer 300 l. stock in a fortnight, and account for all dividends since plaintiff ought to have transferred, and costs at law, and here, or dismiss the bill with costs. 2 Vern. 394. pl. 365. Mich. 1700. Gardner v. Pullen.

31. As a *beneficial bargain* will be decreed in equity, so if it happens to be a *losing* one, it ought for the same reason to be decreed; per Wright K. 2 Vern. 423. Pasch. 1701. City of London v. Richmond & al'.

Fin. Rep.
332. Mich.
29 Car. 2.
Howes v.
Huntingdon
& al' S. P.

Ch. Prec.
156. S. C.
—Ch. Prec.
589. Beech
v. Crull,
S. P.

32. Equity will not carry *unreasonable* agreements into execution. MS. Tab. February 9th, 1721. Brain v. Woolly. July 11th, 1721. Carol v. Chamberlain. March 24th, 1720. Top v. Stanhope.

33. Equity will not decree *tenant for life to commit a forfeiture*. MS. Tab. February 1721. Brian v. Acton.

34. Nor where the *method of obtaining them is not strictly regular*, although executed in part. MS. Tab. May 22d, 1721. Rochford v. Creswick.

35. Nor where a person of *weak understanding* is drawn into it. MS. Tab. July 14th, 1721. Carol v. Chamberlyn.

[534] 36. *Earl Godolphin agrees with builders, before the act made for building Blenheim at the expence of the crown; and recites, that he made such agreements at the instance and desire of the Duke of Marlborough.* The duke is bound by such agreement, and as well liable to pay for the work done after the statute as before. MS. Tab. May 8th, 1721. Ducheſs of Marlborough v. Strong.

37. Whether an agreement *made with the committee of the vestry, but never made an act of the vestry*, shall be carried into execution? MS. Tab. November 23d, 1722. Bennet v. Perry.

38. Where a contract has *lain dormant for many years*, there shall be no specific performance decreed. MS. Tab. March 3, 1722. Wingfeild v. Whaley.

39. The plaintiff's house being so near the church, that the 5 o'clock bell rung in the morning disturbed the plaintiff. He came to an *agreement in writing with the churchwardens and inhabitants, at a vestry, that the plaintiff would erect a cupola and clock at the church, and in consideration thereof, the 5 o'clock bell should not be rung in the morning*; this is a good agreement, and decreed to be binding in equity. 2 Wms.'s Rep. 266. Hill. 1724. Martin & al' v. Nutkin & al'.

40. Private agreement *in derogation of marriage articles* set aside. MS. Tab. 1728. Morrison v. Arbuthnot.

41. A. treats for the *marriage of his son, and in the settlement on his son there is a power reserved to the father, to jointure any wife, whom he should marry, in 200 l. per annum, paying 1000 l. to the son.* The father treating about marrying a second wife, the son agrees with the second wife's relations to release the 1000 l. and does release it, but takes a private bond from the father for the payment of this 1000 l. Equity will not set aside this bond, because it would be injurious to the first marriage, which being prior in time is to be preferred. 3 Wms.'s Rep. 66. pl. 17. Trin. 1730. Roberts v. Roberts.

42. A. article'd with B. *for the purchase of land devised to B. by J. S.* Afterwards B. sued A. to compel him to complete the purchase and pay the purchase money. B. answered, that he believed J. S. duly executed the said will, and devised the premises, as set forth, and admitted the articles, and that he was ready to proceed in his purchase, all proper parties joining. *The will was proved in Chancery to be duly executed; but the heir who was beyond sea, though made a party defendant, had not appeared to or answered the*

the said bill. B. had entered upon part of the estate, but the other part being in a bad condition, he wanted to be discharged of his purchase. Ld. Chancellor King said, that it appears the defendant who articted for the purchase, knew at that time that the heir was beyond sea, and still accepted the title, without insisting that the heir should join, or that the will should be proved against the heir; also the defendant admits by his answer, that the will was duly executed, and by entering upon great part of the estate, has himself executed the purchase, for which reason let him pay the rest of the purchase money, with interest, according to the articles; and at the same time let the trustees and mortgagees join in proper conveyances to the defendant the purchaser. It seems in this case to have been a great help to the title, that the mortgage made by the testator, and prior to the will, was for the greatest part of the purchase money, which must be kept on foot for the protection of the title. 3 Wms.'s Rep. 192, 193. Trin. 1733. Colt v. Wilson & al'.

43. *A bill in equity lies not to compel the performance of an agreement to pay in consideration of having stifled a prosecution for felony; otherwise if to stop a prosecution at law for a fraud. 3 Wms.'s Rep. 279. Pasch. 1734. in case of Johnson v. Ogilby & al'.*

44. *An agreement was assigned by the parties, and by the consent made an order of Court to submit to such decree as the Court should make, and neither party to bring an appeal, yet the cause allowed to be re-heard. 3 Wms.'s Rep. 242. pl. 57. Hill. 1733. Buck v. Fawcett.*

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45. *An attorney, for and on behalf of his client the defendant, promises to pay 500 l. This being done by the consent of the client, the attorney is not liable, but only the client; otherwise if the attorney had no authority from his client to make this engagement. 3 Wms.'s Rep. 277. pl. 68. Hill. 1734. Johnson v. Ogilby & al'.*

46. *A trust estate was decreed to be sold for the payment of debts and legacies, and to be sold to the best purchaser. A. articles to buy the estate of the trustees, and brings a bill to compel them to perform the contract. The trustees by their answer disclose this matter. The Court will make no new decree, but will leave the former decree to be pursued. 3 Wms.'s Rep. 282. Trin. 1734. Annesley v. Ashurst.*

(M) Decreed in Specie.

1. *IF a man promises me to make me a house, which he does not do, I shall have remedy by subpoena, and if my feeoffee of trust will not perform my will, I shall have subpoena against him; per Jenny; quod nota. Br. Conscience, pl. 14. cites 8 E. 4. 4.*

2. *On producing precedents the Court found it warranted by them, and the constant practice of this Court, that where such agreements have been made on which the party can only recover*

As upon covenant that a jointure was and should con-

damages

time of such
value. Abr.
Equ. Cases,
18. Hedges
v. Everard.

S. C. cited
Arg.
2 Wms.'s
Rep. 467.
in case of
Randall v.
Randall.

damages at law to decree the thing to be performed in specie, wherein this Court does not bind the interest of the lands, but enforces the party to perform his own agreement. Chan. Rep. 158: 21 Car. 1. Wiseman v. Roper.

3. B. having married without his father's privity, A. his uncle, in order to regain the good-will of the father to B. did, in consideration of natural affection to B. as for regaining the good-will of the father to B. covenanted with the father, that in case the manor of H. should descend to him, he would settle it on himself for life, remainder to B. and his wife for life, remainder to B. and if such descent should be prevented by alienation, then he would assure other lands which might descend to him of that value, and if no lands of that value descended, he would secure 4000 l. to be paid at his death. The manor did descend to A. and upon a bill by B. and his wife, the Court, upon searching and considering precedents, decreed a specific performance, and that A. convey accordingly, though at the time of entering into the covenant B. had no power over the lands to be settled. Ch. Rep. 158. 21 Car. 1. Wiseman v. Roper.

4. The vendor entered into articles with the vendee, to convey the estate clear of all incumbrances, and some were to be paid out of the purchase money, and the vendor entered into a recognizance for the performance of his part, and thereupon 700 l. part of the purchase money was paid, but by the articles the vendee had liberty to be discharged of the bargain if he gave notice thereof before such a time, and then the vendor was to pay back 700 l. The vendee liked, and afterwards disliked, and gave notice thereof, and desired to be discharged, but the vendor exhibited a bill for specific performance of the articles. Vendee objected incumbrances not discharged, and assigned, &c. Decreed the vendor to pay the 700 l. at Midsummer next, and interest from this time, and then the recognizance to be delivered up and vacated, or in default, that the bill be dismissed, but without costs. Fin. Rep: 12. Mich: 25 Car. 2. Hatton v. Long.

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5. Tenant for life decreed to perform an agreement in specie as far as he was capable, and from which he would have discharged himself by pretending that in so doing he was subject to an action of waste; and damages decreed against him according to what plaintiff had sustained by his not enjoying the premises according to his agreement. Fin. Rep. 164. Mich. 26 Car. 2. Cleaton v. Gower and Carleton.

6. A. seised of a considerable estate of lands, both free and copy, and of a good personal estate, in consideration of 1500 l. agreed to settle all his lands which he had or should have except B. Acre, and to leave all his personal estate, except 3000 l. so that all should come to B. after his death. On a bill by B., A. was decreed to convey, and the writings to be delivered to the usher of the Court. Fin. R. 230. Trin. 27 Car. 2. Coke v. Bishop.

7. The heir at law pretending a right to the land, threatens to evict the tenant in possession, who likewise claimed an interest in the fee, whereupon the tenant promises thus, viz. if I die without issue of my body,

body, I will either give you 500 l. or leave you my land. The tenant was a feme sole at the time of the promise, but after marries, and devises the estate to the husband (who had no notice of this agreement, nor had any other portion with her), and dies. Finch C. decreed the agreement to be executed. Vern. 48. pl. 47. Mich. 1682. Goimere v. Battison.

8. In case of agreement to quit possession of lands, Chancery will not decree a conveyance; but per Ld. K. North, *if the agreement had been to have conveyed* those lands he would have decreed the agreement, though he was not apprised what estate he had in them. Vern. 121. pl. 111. Hill. 1682. Gerard v. Vaux.

9. The plaintiff assigned some shares of the excise to the defendant, who thereupon covenanted to save him harmless, and to stand in his place touching all payments to the king. The plaintiff, being sued by the king, brought his bill to have the agreement performed in specie, and although it was insisted that the plaintiff might recover damages at law, and that this was not a covenant for any thing certain, and that by this means a master in chancery was to tax damages instead of a jury; yet it was decreed that the defendant should perform his covenants, and it was directed to a master, that as often as any breach should happen, he should report it specially, that the Court, if occasion should be, might direct a trial in a quantum damnificat'. 1 Vern. 189. Mich. 35 Car 2. Ld. Ranelagh v. Hayes.

10. Bill was brought to have a specific performance of a covenant, by which the plaintiff was to have a pit for digging black stone in defendant's ground, and that there should be no other pit there for such purpose; but it appearing that defendant, and those under whom he claimed, had had a pit there for above 60 years past, the court dismissed the bill. 2 Vern. 127. Hill. 1690. Scolefield v. Whitehead.

11. Where no action at law will lie to recover damages, there this Court will not execute the agreement in specie, for equity will never make that a good agreement which is not good by law. 2 Freem. Rep. 217. pl. 289. Mich. 1697. Normandy, Marquis, v. Duke of Devonshire.

12. It was said also, that where this Court executes an agreement in specie, it must be such an agreement as is fairly made, without any fraud or circumvention. 2 Freem. Rep. 217. pl. 289. Mich. 1697. Normandy, Marquis, v. Devonshire.

13. Sir R. B. having issue only daughters, settled his estate upon trustees to sell, subject nevertheless to a power of revocation; afterwards, upon the marriage of his daughter with the plaintiff, by deed reciting, that his intent was that the manor of C. in question should go to the issue male of the plaintiff, he thereby agreed, that if the plaintiff should be minded* to purchase the same to him and his heirs, he should have it for 1500 l. cheaper than the best purchaser would give for the same. Sir R. B. afterwards made his will, and gave the complainant 1500 l. to be raised out of this manor, but did not mention whether it should be in satisfaction of the 1500 l. agreed to be allowed the plaintiff in case he would purchase the same. The

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2 Vern. 415. pl. 379. Hill. 1700. Bromley v. Jefferies & al' S. C. accordingly; and the Court observed further, that the covenant was not mutual; for the plaintiff

was not bound to take it at any price; and it was observed, that as the covenant was worded, if the plaintiff had died in the lifetime of Sir R. the covenant was of no effect; and it was said, that if Sir R. afterwards had a son, it should have discharged the covenant. — Chan. Prec. 138. pl. 121. S. C. and by the Master of the Rolls the will recites the settlement and revokes it, which is, by construction, a defeating of the 1500 l.

but however, a court of equity is not obliged to decree a specific execution of all covenants and agreements, be they on never so valuable considerations, but will consider all circumstances; and Sir R.'s circumstances, and the condition of his fortune, being so much altered (he being much indebted at the time of making his settlement), and thereupon his purpose so much changed, that if a specific execution of this covenant should be decreed, the whole will would be defeated, and therefore he thought it ought not to be executed in this case; and of the same opinion was the Ld. Keeper, and dismissed the bill.

plaintiff preferred his bill to have the agreement executed, *that he might purchase the said manor, and have an allowance of the 1500 l.* It was held, that as it stood barely upon the deed, this Court would not execute this agreement in specie, for *this Court will not execute all agreements in specie, but will consider upon circumstances relating to the said agreement, the reasonableness and equitableness of executing the same*, and will in many cases leave the party to his remedy at law to recover damages only for not performing the said agreement; and the reason why they would not execute it in this case, was, because, as it appeared upon the face of the said agreement, it would not answer the intent of it, it being declared by the said Sir R. B. in the said agreement, that *it was intended that this manor should go to the issue male of Mr. Bromley, and Mr. B. having been married 22 years, and having no issue male, it was plain the main end of the agreement would not be answered by an execution in specie.* 2 Freem. Rep. 245, 246. pl. 313. Hill. 1700. Bromley v. Fettiplace.

14. And it was said by the Lord Keeper, for another reason, he could not be for executing it, because he looked upon it as *impracticable for Mr. B. to have it at 1500 l. less than the best purchaser would give*, because it was impossible to know what the purchaser would give; for it could not be exposed to sale before a master to the best purchaser, because whoever should bid for the estate was not to have it because Mr. B. was to have it 1500 l. cheaper. The plaintiff's bill was dismissed as to the executing of the agreement in specie, but was offered a decree for the 1500 l. legacy, but then was to be enjoined from proceeding at law, and had time to consider whether he would take it or not. 2 Freem. Rep. 245, 246, 247. pl. 313. Hill. 1700. Bromley v. Fettiplace.

15. It was said, that *generally this Court will not execute an agreement in specie, but when the agreement is such that an action of law will lie for damages for nonperformance of it*; but in some cases that will not hold; for if a marriage agreement should be *so ill worded, that an action would not lie at law for the breach of it, yet this Court will decree a performance*; per Master of the Rolls. 2 Freem. Rep. 246. pl. 313. Hill. 1700. Bromley v. Fettiplace.

16. And sometimes subsequent accidents discharge the execution of an agreement in specie, and cited the case in Fitzh. Subpoena, 23. cited in SHELLEY'S CASE, * 1 Rep. 100. where a man being sick, directed his trustees to convey to his daughter, and afterwards had a son born, and dies; the trustees shall convey to the son, and not to the daughter; per Master of the Rolls, 2 Freem. Rep. 246. pl. 313. Hill. 1700. Bromley v. Fettiplace.

17. On a quarrel between baron and feme, the baron agreed with the father of the wife that he would return her portion to the father,

who

* 2 Vern. 416. pl. 379. cites S. C.

*who should keep his daughter, and indemnify the baron from debts; afterwards * the baron offering to re-take his wife, the baron refuses payment of the portion back; but notwithstanding, the payment was decreed on the father's giving security to indemnify the baron against the debts and maintenance of the wife and child.* 2 Vern. 386. Mich. 1700. Seeling v. Crawley.

18. Where one *person hath trifled*, or shewn a backwardness in performing his part of the agreement, equity will not decree a specific performance in his favour, especially if circumstances are altered. MS. Tab. Jan. 26th, 1702. Hayes v. Caryll.

19. Bill brought by a son to set aside an *agreement with his father for releasing his inheritance, being a trust estate in tail for an annuity*, because he was under the power of his father, was dismissed, because there being no fraud proved, and *the son having been extravagant*, but without prejudice to his heir. MS. Tab. January 25th, 1710. Green v. Green.

20. A party that enters into *articles in violation of a trust* shall never take benefit by them. MS. Tab. August 17th, 1715. Daly v. Linch.

21. Bill for a specific performance of an agreement to transfer stock. Case was, *the defendant agreed with the plaintiff to transfer to him 1000 l. S. S. stock upon the 20th of November then next following, at the rate of 104 l. per cent. and gave him a promissory note under his hand for so doing, and received two guineas of the plaintiff in part of the consideration money; but the defendant in drawing the note had put in the usual words (or pay the difference) which the plaintiff struck out, and would not agree to, and then the defendant signed the note.* After the bargain made, and before the time of delivering the stock, the S. S. stock did rise considerably in value, and the defendant did not deliver the stock at the day, but a few days after offered to pay the difference, and submits so to do by his answer; but the plaintiff insists to have the stock actually transferred to him, and refuses to take the difference, &c. Sir Robert Raymond and Mr. Vernon for the defendant insisted, that buying of stock in this manner to be delivered at a future time, at a certain price, was in nature of a wager upon the rise and fall of stock, and therefore paying the difference is a sufficient performance of the contract; that a contract for sale of stock differs from other contracts for sale of an house, lands, &c. for in such things there may be a particular conveniency or benefit to the buyer in this individual house, &c. but it is not so in stock; for one 1000 l. is as good as another 1000 l. stock, and is to be purchased daily in Exchange-alley; that the plaintiff has his remedy at law for the damages, viz. the difference, and that is the justice of the case between the parties; that it is discretionary in the Court to decree a specific performance of an agreement, and that in many cases the Court will leave the party to his remedy at law for breach of a contract, &c.

Sir Joseph Jekill the Master of the Rolls said, that this is a fair and reasonable agreement, and he saw no reason why the Court should not in this case, as well as others, decree a specific per-

formance of the contract, especially since it was insisted upon by the plaintiff at the making the agreement; that he should not be obliged to take the difference, but would have the stock actually delivered to him, and it is more for the advantage of the buyer to have the stock than the difference, and saves him the trouble of buying it of another, and paying brokerage; and decreed that the defendant do transfer the stock and pay the dividends since 20th November, plaintiff to pay interest of the money to that time, and ordered costs to the plaintiff.

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On an appeal from this decree, Parker C. upon opening the cause, asked if the plaintiff was at the South Sea house upon the day appointed for transferring the stock to demand it, and tender the money, and seemed strongly against the plaintiff, and urged the law in case of a bargain for corn to be delivered upon a day certain at such a market, at such a price, and the corn is not delivered according to the contract, the buyer shall not by a bill in equity compel the seller to a specific performance of this agreement, but the buyer is left to his remedy at law for breach of the agreement, to recover damages, (*id est*,) the difference between the price agreed on by the parties, and the price of corn upon the market day.

It was said, it was the common justice of this Court, to compel the party to a specific performance of his agreement, if the same was just and reasonable, and fairly obtained; that this was a just, reasonable, and fair agreement in all the circumstances; it was the current price of the stock at that time, and no imposition upon the defendant; that the subsequent rise could not alter the case, for it was an equal hazard that it might fall, and the parties in such contracts executory must take their chance; they compared it to the case of a contract for so many bales of silk, or any other merchandise to be delivered at a future day, at a certain price; if the value of the silk or other goods doth rise before the day, that is no excuse for non-performance of the contract. So in the case of a contract for lands, if lands rise in value, yet the party ought to execute his agreement. They said, that from the time of the contract, to the time appointed for the delivery, the stock did not rise above 12 l. per cent. that it was not more at the time of filing the bill, which was in January 1718; nay, it was not more at the time of the decree pronounced by the Master of the Rolls in Mich. term last, and though the stock has risen since to a vast price, between 900 l. and 1000 l. per cent. if the plaintiff suffers by that, it is his own fault in not performing his contract sooner, when he was demanded so to do, and in not obeying the decree as he ought to have done; that whatever has happened since cannot alter the case; that the contract was reasonable at the time it was made, and so it was when the bill was filed, and the decree pronounced.

It was said for the defendant, that the rule was laid down too general for compelling the execution of agreements between the parties; that this Court would not compel the party to perform a *hard agreement*, though it was fair at the time it was made, but leave the

the other party to his remedy at law; that it was very unreasonable now to compel the defendant to transfer 1000 l. S. S. stock to the plaintiff at 104 l. 10 s. per cent. when it was worth 1000 l. per cent. that paying the difference at the day was a good performance of this contract; that the plaintiff knew that the defendant had no stock when he made the bargain with him, and therefore could not expect to have the stock delivered to him, but to have the difference if the stock should happen to rise before the time, and he had no more intention to take the stock than the other had to deliver it, and this appears by his *non-attendance at the S. S. house upon the day to accept and pay for the stock*. They cited the case of MARQUESS OF NORMANDY AND LORD BERKLY, tempore Ld. Somers C. who said in that case, that the Court would not carry agreements into execution unless the *contract was reasonable and fair in every particular*, because they cannot mitigate damages upon the circumstances of the case as a jury may do, but must decree the whole contract to be performed.

It was replied, that *plaintiff some days before the stock was to be delivered, told the defendant that he expected to have the stock delivered to him, but the defendant said that he had not the stock, and therefore would not deliver it, and afterwards the defendant kept out of the way for some days, and the plaintiff could not find him, and that was the reason he did not attend at the S. S. house to accept the stock; that this being occasioned by the defendant's own unfair dealing, the plaintiff ought not to suffer by it, and upon that account the plaintiff ought to be relieved in equity, because he is remediless at law for want of a legal demand and tender upon the day.*

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Parker C. There is no reason to bring this bill for a specific performance of this agreement, because there is *no difference between this 1000 l. S. S. stock, and another 1000 l. stock, which the plaintiff might have bought of any other person, upon the very day, and the plaintiff doth not suffer at all by the non-performance of the agreement specifically, if the defendant pays him the difference; these sorts of contracts are commonly understood to mean no more than to transfer the stock or pay the difference, and this fully answers the intention of the parties, and the party has thereby the intire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person, and be no more money out of pocket than if the stock were delivered to him according to the agreement; this differs very much from the case of a contract for lands, some lands being more valuable than others, at least more convenient than others to the purchaser, but there is no difference in stock, one man's stock is of equal benefit and conveniency as another's.*

2dly, It appears that the *defendant had not the stock when the contract was made*, and this Court will not decree a specific performance of a contract when the party has not the thing to deliver. Suppose a contract for the sale of land, and the party has not the land at the time he contracted for the sale of it, this Court would not decree a specific performance of the agreement; if

there be a contract for the sale of malt, or any other commodity, and the feller has not the malt or other things agreed to be delivered, this Court will not compel the party to perform his agreement, but leave the buyer to recover his damages at law for non-performance of the agreement.

3dly, In contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a court of equity to carry into execution; the decree might be beneficial to the plaintiff one day, and to his prejudice the next. I shall always discourage bills of this kind, but since the defendant did shuffle with the plaintiff, and not offer to pay him the difference till two months after the day, I will not dismiss the bill, but let the master enquire what the difference was at the day, and the defendant pay it to the plaintiff with interest, but no costs. Decree reversed per Parker C. MS. Rep. Trin. 6 Geo. Cuddee v. Rutter.

22. Bill for a specific performance of a contract for 1000 l. *York Buildings stock* at 105 l. per cent. *Bill dismissed*, for that a court of equity will not carry these sorts of contracts into execution, but leave the parties to their remedy at law for the difference, but no costs in this case, because the defendant's answer was falsified in several particulars; per Macclesfield C. MS. Rep. Trin. 8 Geo. Canc. Dorison v. Westbrook.

S. C. cited
Trin. 1731.
as established
by decree of
this Court.
2 Wms.'s
Rep. 608,
609.

23. A. and B. who had married two sisters, presumptive heirs of J. S. article to divide equally between them whatsoever should be given to either of them by the will of J. S. J. S. by his will gave a great real and personal estate to A. and only a small real estate to B. who brought a bill against the executors of A. for an account. It was objected, that such articles were not to be encouraged. But *Ld. C. Macclesfield* held, that a performance ought to be decreed, and his lordship decreed accordingly. 2 Wms.'s Rep. 182. Trin. 1723. Beckly v. Newland.

See supra,
pl. 15.

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24. It being laid down as a rule, that *wherever no action lies at law to recover debt or damages*, there *no suit in equity lies to compel a specific performance*, which specific performance is given in lieu of damages; but *Ld. C. Macclesfield* denied this rule to be true; which he said was plain from this case; *as if a feme infant seized in fee upon a marriage with consent of guardians, should covenant in consideration of a settlement to convey her inheritance to her husband*. If this were done in consideration of a competent settlement, equity would execute this agreement though no action would lie at law to recover damages. 2 Wms.'s Rep. 243, 244. Mich. 1724, in case of Cannel v. Buckle.

9 Mod. 153.
Trin.
11 Geo. 1.
in Canc.
Charles v.
Andrews,
S. P. and
decreed
though the
heir of the

25. It is a general rule in equity, that where there is a purchaser for a valuable consideration on articles only, without any other conveyance, those articles shall be carried into execution, and this is often done in the case of an heir on the articles of his ancestor; Arg. 9 Mod. 16. Mich. 9 Geo. 1. in Canc. Lady Coventry v. Lord Coventry.

heir of the vendor was an infant, that he join in the conveyance within six months after age.

26. Marriage

26. *Marriage agreement was to surrender copyhold estate to use of the wife and her executors if she survived, and gave a bond for performance. The wife survives and dies. The bond was put in suit, and recovery thereupon. Then bill was brought for specific performance and surrender of copyhold which was decreed, but deduction to be made of damages recovered. Decreed by Lord C. King. Mich. 1625. Dowding's case.*

27. *A. purchased land in B.'s name, and B. gave bond of 200 l. to convey it to such uses as B. should appoint, but did not. Though the penalty of the bond was recovered at law, and actually paid, yet the obligor is compellable in equity to convey the land, and account for the profits, but then he shall be allowed the 200 l. and interest; per Lord C. King. Mich. 1725. 2 Wms.'s Rep. 314. Moorecroft v. Dowding.*

28. *Bill for the execution of articles for the sale of lands against the executor and devisees of land for life, and the infant heir of the vendor.*

Mr. Lutwich pro' quer'. Though these articles for the sale of this estate were made and executed by the vendor after the making his will, which he thought was a revocation of the devise of those lands in equity, yet the legal estate for life he apprehended was in the executor and devisees, and therefore he prayed a conveyance from the devisees, and an injunction for quiet enjoyment against the infant heir at law, &c. but did not pray an immediate conveyance from the infant heir, because he did think him a trustee within the meaning of stat. 7 Ann. cap. 19. so as to be able to make a good conveyance by virtue of that act; for though the vendor after a contract for sale of his lands is considered in equity as a trustee for the purchaser, yet he is only a trustee by implication, and not an express trustee; as where lands are conveyed to A. in trust for B. and these express trusts only are within stat. 7 Ann. cap. 19.

King C. decreed, that the articles be carried into execution, and the plaintiff Sikes, upon paying the purchase money to the executor, to be let into possession at Lady-day next, and the defendants, the executors, and devisees, to make a conveyance to the plaintiff and his heirs at the costs of the plaintiff, and the plaintiff to hold and enjoy the premises against the infant heir, and the heir when he comes of full age to convey to the plaintiff and his heirs, unless the infant heir, within six months after he comes of full age, shews cause to the contrary. Per King C. MS. Rep. Hill. 12 Geo. in Canc. Sikes v. Lister & al'.

29. *A bill was to have execution of articles of agreement for the purchase of copyhold land, setting forth the title, which appeared to be doubtful. The Court said it seemed to be a bill brought to know the opinion of the Court, whether the plaintiff had bought a good title or not; but Lord Chancellor would give no opinion as to that, or as to a doubtful custom of barring entails in the manor mentioned likewise in the bill; but decreed in general a specific performance of the articles, and decreed the lord (he being also a party) to admit the plaintiff accordingly. G. Equ. Rep. 189. Hill. 12 Geo. 1. Sayle v. Reeves.*

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Contract and Agreement.

30. Bill lies to compel a specific performance of an award to convey an estate, where the party submitting has received the money, in consideration whereof he is to convey the estate sued for. 3 Wms.'s Rep. 187. pl. 45. Trin. 1733. Hall v. Hardy.

(N) Decreed. Though there is no, or a very unequal, Consideration.

1. **A** Greement on a *very unequal consideration*, as where A. before the restoration of Charles 2d, sold a lease held of a dean and chapter for three lives for 4320l. Afterwards B. agreed with A. the plaintiff, that if A. would abate him 420l. he would re-convey the lease when the king, and the dean and chapter were restored. The plaintiff thereupon abated the 420l. and now after the restoration of the king, and dean, A. brought his bill for the lease against the son of B. and the same was decreed him by the Master of the Rolls. And the same was afterwards affirmed by the Lord Chancellor and Bridgman. Chan. Cases, 42. Hill. 14 Car. 2. Parker v. Palmer.

2. *A. seized in tail of freehold lands, with remainder to B. his elder brother, and in fee of copyhold lands, devised the copyhold lands to B. and devised the freehold lands to C. the plaintiff, his younger brother. B. the defendant apprehending, as C. had suggested to him, that there had been a recovery suffered by the testator, agreed with the plaintiff without any consideration, that each of them should enjoy the lands according to the will; but discovering afterwards that no recovery had been suffered, he brought his action to recover his freehold lands; and the plaintiff brought a bill to establish the agreement; which was decreed accordingly.* 1 Chan. Cases, 84. Pasch. 19 Car. 2. Frank v. Frank.

3 Chan. Rep.
26. Mich.
20 Car. 2.
and Trin.
21 Car. 2.
Booth v.
Sanky, S.C.

3. A. was indebted to B. by bond, and C. was indebted to A. C. gave judgment to B. for the debt which A. owed him. B. delivered up A.'s bond, and A. gave B. a new bond that A. would pay the money, if C. did not. Afterwards B. promised A. that if A. at his own charge would extend C.'s land, B. would deliver up the new bond. The promise was proved, and that A. at his own charge did extend C.'s lands. The bond was ordered to be delivered up, though the extent would not satisfy the debt, and C. became insolvent. N. Ch. R. 128. 21 Car. 2. Booth v. Sanky.

4. A scrivener neglecting to inquire into a title for his client, on which money was to be lent, and the money being lent, and the title proving bad, the scrivener agrees to make satisfaction another way, and reduces it into writing; and it was decreed in specie, though it was insisted that there was no consideration. Ch. Prec. 19. pl. 20. Hill. 1690. King v. Withers.

5. A subsequent deliberate act confirming an unreasonable bargain, when the party is fully informed of every thing, and under no fraud nor surprise, shall make the bargain good. A. having
500l.

500 l. given him by his uncle, in case he should survive the testator's wife, sells it for 100 l. to be paid by 5 l. per ann. but that if the testator's wife should die before A. and the legacy become due, in such case the rest of the money to be paid within a year then next following. A. does survive the * testator's wife, and knows the legacy was become due to him, and being fully apprized of the whole, confirms the bargain; he shall be bound thereby. 3 Wms.'s Rep. 290. pl. 73. Trin. 1733. Cole v. Gibbons & al', and Martin v. Cole & al'.

(O) Not perfected, but decreed; and against whom, not Party thereto.

1. **T**HE bill prayeth relief against the defendant as brother and heir, for that the *plaintiff paid to his brother deceased a fine of 34 l. for a lease*, who died before the same was made, and therefore desireth either to have the lease made by the heir, or his money again; thereupon it was ordered the defendant shall answer, and an injunction granted. Cary's Rep. 110. cites 21 & 22 Eliz. Keem, alias Mogge, v. Meere.

2. A man that *marries the executrix* of one that makes an agreement, shall be as far bound as he himself that made the agreement. Trin. Toth. 66. 40 Eliz. li. B. fo. 118. Smith v. Gouch.

3. A. agreed to *lease Bl. Acre to J. S. for ten years*, but before A. made the lease according to his promise *he infeoffed B. of Bl. Acre, for a valuable consideration*, and B. had notice of this promise before the feoffment made to him. B. is compellable in Chancery to make the lease to J. S. according to the promise, and by reason of the notice; cited by Tanfield Ch. B. as decreed in Chancery in the case of GORE v. MICLESWORTH, and so the Court agreed in the principal case. Lane, 60. Trin. 7 Jac. in the Exchequer. Jackson's case.

4. Agreement to convey lands in tail though embezzled decreed to be performed according to the said articles. Toth. 66. Maii 11 Jac. li. A. fo. 864. Bates v. Heard.

5. Bill to be relieved concerning a promise to *assure land of inheritance*, but because there was no execution thereof, but *only 55 s. paid in hand*, dismissed. Toth. 85. cites 30 Jac. Miller v. Blandist.

6. A promise to *make a lease in marriage* decreed against a purchaser. Toth. 262. cites Trin. 2 Car. Church v. Dom' Mordant.

7. An agreement for a custom shall bind a purchaser or heir. Toth. 67. 12 Car. Spicer v. Dockwray.

8. Articles of purchase were decreed to be performed against a voluntary conveyance made before the articles. Chan. Rep. 146. 16 Car. 1. Leach v. Dean.

And also against a conveyance for a valuable consideration

made after, the purchaser's agent having notice. N. Ch. R. 59. 13 Car. 2. Merry v. Abney.——Chan. Cases, 38. Merry v. Abney, S. C. but calls it only a contract, and that the notice was given to him that made the purchase for another.——Toth. 67. Mich. 2 Car. Wilkinson v. Dean.

9. A person that suffered a *recovery* was, in point of law, only *tenant for life*, but there had been an agreement precedent to the recovery by the ancestor, that was dead, for the settling of the premises so as to have made the tenant for life tenant in tail; resolved that the recovery should be good in equity, and should work upon the agreement. Chan. Cases, 49. Pasch. 16 Car. 2. Goodrick v. Brown.

Nelf. Chan.
Rep. 106.
17 Car. 2.
S. C.

10. *Tenant per auter vie to him and his heirs articulated for a sale and died*; though this is such an estate as is not affects to the heir, yet he was decreed to execute this agreement. 2 Freem. Rep. 199. in pl. 274. cites it as the case of Stephens v. Bailly.

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So where
mortgage
money was
paid, and the
copyholder
died before

11. Decreed that a *copyhold for life* shall be surrendered according to the agreement, the purchase money having been paid to the first life who was grantee, and died before his purchaser's admittance. Chan. Rep. 272. 18 Car. 2. Greenwood v. Hare.

any surrender made, his heir, an infant, was decreed to surrender, unless cause shewn within six months after full age. Fin. R. 272. Mich. 28 Car. 2. Patterson v. Thompson & al'.

12. *Tenant in tail mortgages without levying a fine, and covenants for further assurance*; the issue is not bound in equity to make good this assurance. Lev. 238. Pasch. 20 Car. 2. in Canc. Jenkins v. Keymish.

Relief de-
nied where
the whole
money was
not paid at
the day, and
where there was the face of fraud.

13. Plaintiff agreed with defendant for the purchase of an house for 290 l. to be paid, and paid 20 s. in hand, and tendered the rest at the day; and relieved. 3 Ch. R. 28. Mich. 21 Car. 2. at the Rolls. Voll v. Smith.

a Vern. R. 187. pl. 169. Mich. 1690. Whorwood v. Simson.

14. *Tenant in tail* is bound by his agreement to convey, but the issue in tail is not bound by that agreement; but if *issue in tail accepts the satisfaction* which was agreed to be given to the tenant in tail, it now becomes his own agreement, and shall bind him. Chan. Cases, 171. Trin. 22 Car. 2. Rofs v. Rofs.

15. An agreement for inclosing lands, which were exchanged, was confirmed by a decree against several, whereof the parson of the parish was one, and he and his successors bound as to the tithes. Fin. Rep. 18. Mich. 25 Car. 2. Edgerley v. Price & al'.

16. The question was, whether the issue shall be bound by the agreement of his father, where it was an *entail in equity only*, and not in law, and no fine passed? Per Lord Keeper, where equity creates the estate it shall be guided by conscience (and seemed to incline to make good the agreement). Chan. Cases, 234. Mich. 26 Car. 2. Norclif v. Wortley.

17. A settlement agreed to be made on marriage was decreed, after the death of the father who made the agreement, to be executed, and the grandson when of age to levy a fine. Fin. R. 170. Mich. 26 Car. 2. Foster v. Foster.

18. An agent for a purchaser of lands entered into articles, and died before the purchase completed, and so did the vendor. But the

the heir was decreed to execute a conveyance, and to be indemnified from the heirs of the agent till a perfect release or conveyance be procured from them. Fin. R. 201. Hill. 27 Car. 2. Earl of Bath v. Harvey.

19. *Lessor covenants with lessee to take a new lease of a college, and then to add three years more to the lease, or answer the want thereof in damages, the lease being of coppice ground, and of no profit to the lessee without such addition of three years. Lessor took a new lease, but instead of adding three years sold it to a third person, who had notice of the covenant at the time. Decreed that the vendee perform the covenant.* Fin. R. 212. Pasch. 27 Car. 2. Finch v. the Earl of Salisbury and Hawtry.

20. Agreement for sale of an annuity for years by the baron of an executrix, who dies, binds not the executrix. 2 Chan. Cases, 17. Hill. 31 & 32 Car. 2. Elton v. Waite and Harrison.

21. Contract for a copyhold estate. *Purchase money paid. Bargainor dies before surrender. His heir decreed to surrender when he should come of age, and the lord of the manor presently to admit the plaintiff tenant of the premises.* 2 Chan. Rep. 218. 33 Car. 2. Barker v. Hill. N.Ch. Rep. 3. 3 Car. 2. by Ld. Coventry, Periman v. Gorge, S.P. though 169. pl. 80. 1584. * *WISTON v. DANVERS*, it was held, that the heir is not in equity bound to assure lands which his father bargained and took money for. * [545]

22. The father and son within age covenant to convey lands on a valuable consideration; the son was *infra etatem*, but being now come of age, the father is decreed to procure the son to convey. 2 Chan. Cases, 53. Trin. 33 Car. 2. Anon. Agreement on marriage, and of a portion to surrender copyhold lands, &c. specific execution decreed against the heir. 9 Mod. 106. Mich. 11 Geo. in Cane. Neeve v. Keck.

23. A. on a treaty of marriage between B. his brother and M. bound himself, his heirs, &c. by deed, to settle certain lands of 141. a year on the said B. and his heirs in case the said A. should die without issue. Afterwards A. married, and settled the same lands on his wife as a jointure before marriage, and dying without issue devised the land to his said wife in fee; but on a bill by B., Ld. C. Finch decreed the land to the plaintiff, because it was proved, that the marriage with the plaintiff's wife was in expectation of the performance of this agreement, and he was obliged to have left the land to the plaintiff if he had had no issue. 2 Vent. 353. Mich. 33 Car. 2. Goilmer v. Paddifson. So where a feme sole gave bond to her intended husband to convey lands to him in fee in case the marriage take effect. The marriage took effect. The wife died, leaving one child, who

died. The husband brought a bill to compel a conveyance. Lord C. Macclesfield said, that the impropriety of the security, or the inaccurate manner of wording such bond, is not material; and the bond being a written evidence of the agreement, and this agreement being on a valuable consideration, he said it should be executed in equity. But the bond being very stale, the Court ordered a trial at law, to see whether the bond was executed or not, and all other matters to be respited till after the trial. 2 Wms.'s Rep. 243. Mich. 1724. Cannel v. Buckle.

24. A. covenants on marriage with B. to purchase lands of 1101. per ann. over and above what he had settled already, and settle it on his wife for life, remainder to his heirs. A. dies, no purchase and settlement made, and administration is granted to B.

The

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The benefit was intended to B. and therefore a bill brought by the heir of A. to have such purchase made for his benefit was dismissed. 2 Chan. R. 271. 35 Car. 2. Langton v. North.

25. An *administrator de bonis non* of the consuee of a statute, had agreed with the consuror to assign it in consideration of a sum of money which upon the said agreement the consuror had covenanted to pay him, his executors, or administrators. Administrator died. The money was decreed to be paid to the executors of the administrator, and not to the administrator de bonis non, though before the extent it could not be assigned at law; sed nota that there were not debts of the first intestate appearing. 2 Vent. 362. Pasch. 35 Car. 2. in Canc. Anon.

2 Chan.
Cases, 30.
S. C.

26. Tenant in tail, with power to make a jointure, *articles to make a jointure*, and dies without issue, and without making the jointure. The wife dies. Executor of the wife brings a bill for an account of profits of the land articulated to be settled. Bill dismissed; per Ld. Chancellor, there is a great difference between a *defective execution* of a power, and a *non-execution* of it. Vern. 406. pl. 380. Mich. 1686. Elliot v. Hele.

The heir
decreed to
perform
such con-
tract of his
ancestor.
Fin. R. 343.
Hill.
30 Car. 2.
Hodges v.
Worley by
his guardian.

27. A. agrees with B. to purchase a copyhold for two lives, and pays 200 l. in part, and was to pay the remainder in three months, and then to name his lives, and take up his copy. A court is held. The time expires, and B. dies suddenly, and the manor comes to one who was not bound by this agreement. The executor of B. decreed to refund the 200 l. though it happened by the laches of the plaintiff. Vern. 472. pl. 459. Mich. 1687. Awbrey v. Keen.

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28. A. in consideration of a portion, *articles to settle a jointure*, and dies before the portion paid or settlement made. The wife takes administration, and so becomes intitled to the money, and then brings a bill against the heir to have her jointure settled. Bill dismissed, for that she was not intitled to the money and the jointure too; but quære. Vern. 463. pl. 443. Trin. 1687. Meredith v. Jones.

29. If a jointenant agrees to alien, and dies before it is done, it would be a strange decree to compel the survivor to perform the agreement. 2 Vern. 63. pl. 56. Pasch. 1688. per Cur. in case of Musgrove v. Dashwood.

30. A. covenants to settle land of such a value, or an annuity out of land; A. at the time of the covenant has no land, but purchases afterwards, and devises it to J. S. and dies. This land shall be liable to the covenant; per Lords Commissioners. 2 Vern. R. 97. pl. 90. Pasch. 1689. Took v. Hastings.

31. A. lends 100 l. to B. and for security takes a warrant of attorney to confess judgment in ejectment of three closes, upon a feigned demise for 20 years. Per Lds. Commissioners, though the security is defective, yet it amounts to a good agreement in equity to charge the land, and decreed it accordingly against the heir. 2 Vern. 151. pl. 146. Trin. 1690. Dale v. Smithwick.

32. The

32. The ancestor in his life-time *articled for the sale of certain lands which he covenanted to convey, but did not covenant for him and his heirs.* The Court held, that the heir was bound to perform this agreement, inasmuch as his ancestor, after sealing the said articles, was in nature of a trustee for the plaintiff of those lands, which trust, with the said lands, descended to the heir; and decreed accordingly. 2 Freem. Rep. 199. pl. 274. Trin. 1694. in Canc. Gell v. Vermuden.

33. A. was bound as surety in a recognizance dated May 5th, 1660, with B. his father for 1500 l. portion with his sister on her marriage. This recognizance was not confirmed by the convention act for confirmation of judicial proceedings, that act having relation to the first day of the sessions, April 25, 1660, and confirmed only recognizances then taken; A. having no concern in the treaty of marriage, being only a surety, and having no allowance for what he did, and not making any promise, the Court would not bind him where he was not effectually bound before, but dismissed the bill; per Wright K. 2 Vern. 393. pl. 364. Mich. 1700. Sheffield v. Ld. Castleton & Ux'.

34. A. was assignee of a commission of bankruptcy issued out against one Bosvil, who had contracted with defendant for goods to the value of 244 l. but not having ready money to pay for them, offered to mortgage to him an estate he had in possession as a security for the money, and for that purpose left with defendant the title deeds to get the assignment drawn. Defendant carried the deeds to an attorney to draw the assignment, who died without doing it; after that he carried them to a scrivener, but before the assignment was perfected, Bosvil became a bankrupt. A. now brought his bill to have the deeds delivered up for the selling of the estate to satisfy the creditors. Defendant's counsel urged, that this was more than a pledge of the deeds, for that an assignment was intended to be made; that if it had been made, the Court would not have taken it from him without payment of the money; that its not being made was owing to the death of the attorney, which was an accident, and this Court often relieves accidents, and therefore the deeds ought not to be delivered up without payment of the money. The Court decreed the deeds to be brought before the Master, and to be delivered by schedule to the plaintiff; but note, no reason was given for this decree. Ch. Prec. 375. pl. 261. Mich. 1713. Brander v. Boles.

35. Bill to compel the defendant and his wife to join in a fine to the plaintiff, pursuant to his covenant in a conveyance, &c. The defendant and his wife, and H. their son and heir, set forth in their answer, that defendant H. is tenant for life, remainder to his wife for life, remainder to the heirs of the husband begotten on the body of the wife, remainder to the heirs of the husband, and insists that nothing passed by the conveyance but an estate for life of the husband, and that the wife did not seal the deed, &c. [547]

Note, The husband and wife were parties to the deed, but the husband only sealed it, though the covenant was that the husband and wife

wife should levy a fine; and a fine sur conusans de droit cōme ceo was levied by the husband alone.

Where the husband for a valuable consideration covenants that his wife

shall join with him in a fine, this Court will enforce a performance of such covenant; per Master of the Rolls. 3 Wms.'s Rep. 187. Trin. 1733. in case of Hall v. Hardy.——Ibid. at the bottom, the reporter adds a note, and says, because in all these cases it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose; so said by the Master of the Rolls, in the case of WINTER v. D'EVEREUX, Trin. 1723; and that the interest in such covenant has been taken to be an inheritance descending to the heir of the covenantor. But after all, if it can be made appear to have been impossible for the husband to procure the concurrence of his wife (as suppose there are differences between them), surely the Court will not decree an impossibility, especially where the husband offers to return all the money, with interest and costs, and to answer all the damages.

36. Marriage articles were, that within a month after marriage he would surrender a copyhold to the wife for life, remainder to the issue, remainder to the heirs of the wife, and if he should neglect or refuse to make such surrender, then he would leave the wife 500 l. at his death. No surrender is made. The husband dies after the month without assets. Parker C. decreed, that the heir at law should surrender to the plaintiff and her heirs, and till surrendered he was a trustee for her. Here was no election; if done after the month, the 500 l. was not to be paid; those are two express covenants, and it is not put in the alternative, and here is no purchaser to be defeated; it is a charge in equity. Mich. 5 Geo. Canc. Wood v. Peasey.

37. Those cases, where the Court will not compel the execution of powers, are, where it would be against the will of the donor that they should be executed; as in the case of heir in tail, this Court will not enforce him to suffer a common recovery, though his father was decreed so to do, and died in contempt for not doing it. 9 Mod. 16. Mich. 9 Geo. in Canc. cited in the case of Lady Coventry v. the Earl of Coventry.

38. Money was devised to be laid out in land to the use of B. in tail, remainder to the use of C. in fee; B. (having no issue) agrees with C. by deed to divide the money, and before this agreement is executed B. dies. This agreement shall bind in favour of his executors. Cases in Equ. in Ld. Talbot's Time, 271. Pasch. 1733. Carter v. Carter.

39. Brokers or factors who act for their principals are not liable in their own capacities; per Ld. Chancellor. 3 Wms.'s Rep. 279. Pasch. 1734. in case of Johnson v. Ogilby & al'.

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(P) Unreasonable, set aside.

1. A Brocade bargain of an unreasonable allowance for assisting to the purchase of an estate, has no equity in it, and a bill for making good such a pretended agreement dismissed. Fin. R. 32. Mich. 25 Car. 2. Gibson v. Lewja.

2. No

2. No relief for a *sale of land in the fens*, according to the statute of draining, though sold at an unreasonable undervalue, as for 33 *l.* what was worth 400 *l.* For Finch C. said, he could not relieve against an *act of parliament*. 2 Chan. Cases, 249. Hill. 30 & 31 Car. 2. Brown v. Hammond.

3. A. articles to sell lands to B. for 15000 *l.* to be paid in money, or so much land to be returned as would make up what he paid short. A. conveys part of the lands to B. and by his persuasion values that part at an under-value. B. sells this part to C. and D. &c. amounting in all to about 4500 *l.* and would now return the rest. Decreed, that the articles be set aside as unreasonable, but that the sales to C. and D. should stand. 2 Vern. 186. pl. 169. Mich. 1690. Broom Whorwood v. Simpson.

4. Bill to have an *execution of articles for a lease* of lands in Norfolk, where the general custom is for the landlords to repair; per Cur. the lessee being plaintiff, and it being proved that the *rent reserved is less than the value* of the land, decreed a lease, but that the *lessee should covenant to repair, and the rent to be subject to no deductions*, save only parliamentary taxes. 2 Vern. R. 231. pl. 210. Trin. 1691. Burrell v. Harrison.

Chan. Prec. 95. pl. 27. Burwel v. Harrison, S.C. but the Court thought that the case might have had a different take a lease.

ent construction if the defendant had been plaintiff, to have enforced the lessee to

5. As a beneficial bargain will, so will a *losing bargain, be decreed* in equity, and for the same reason; per Wright K. 2 Vern. R. 423. Pasch. 1701. City of London v. Richmond.

See 10 Mod. 503. Trin. 8 Geo. in case of Lewis v. Ld. Lech. Keen v. Stukely.

mere.—See Gilb. Equ. R. 155. Mich. Vac. 8 Geo. in Dom' Proc'.

6. A. had an inn in Newcastle descended to him, which was let at 69 *l.* per ann. but *subject to a small mortgage*, and A. being very poor, was inveigled to sell it for 80 *l.* and afterwards brought a bill to be relieved, but was dismissed, Ld. Chancellor declaring, that though the bargain was not a fair one, yet no such fraud appeared as to set it aside. Chan. Prec. 206. pl. 166. Wood v. Fenwick.

7. An agreement for the *purchase* of the remainder of an estate after an estate tail from a woman 90 years of age, by an attorney, for 400 *l.* neither paid nor secured, but in the agreement (which imported a conveyance) mentioned to be paid, and several other suspicious circumstances appearing, Cowper C. would neither decree performance by the heir at law to the old woman (the estate being now fallen in, and worth 5000 *l.*), nor the writing to be delivered upon the cross bill. 2 Vern. 632. Hill. 1708. Green v. Wood.

8. A proportionable *jointure* settled, and an agreement to *repay the portion too* on the husband's dying without issue, decreed and affirmed on appeal. Parl. Cases, 20. Whitfield v. Paylor.

See tit. Jointures (B), pl. 7. in the notes.

9. Contract for S. S. stock at an unreasonable price set aside. MS. Tab. Feb. 13th, 1721. Thompson v. Harcourt.

10. Upon a contest between M. and T. (who had a joint undivided interest in an estate, and who had agreed to set a price upon each

[549] After an examination of several wit-

nesses, &c. and publication, &c. a case was stated for the opinion of Mr. Vernon, who gave his opinion, that as it stands upon the articles and proposal by T. in writing, and M.'s acceptance thereof, the price to be paid by M. to T. appears to be 700 l. over and above the 600 l. and interest, and if the bill be only for a specific performance of the articles, he must either take it according to the articles, and pay not only the 700 l. but also the 600 l. and interest, or his bill will be dismissed with costs; but if the bill be also to explain the articles, and to have a mistake therein, or in the proposal, and his acceptance thereof rectified, inasmuch as the 700 l. was to include the 600 l. and interest, he ought not to have demanded a specific performance, but to have offered either to become a purchaser on 700 l. or to have waived the benefit of the articles and agreement; and indeed he ought rather to have offered to accept 700 l. for his moiety, including the 530 l. paid by him, and since there is such a contrariety of proof, not only as to the value, but of what the parties understood to be the meaning of the agreement, and a proof that Mr. M. himself declared he was to give, or would give 1300 l. the agreement in writing must be the measure between the parties, and the rather, because M. himself offered to pay the interest of the 600 l. over and above the 700 l. so that Mr. M. must pay 1300 l. or suffer his bill to be dismissed with costs, unless he can get off upon an offer to accept 700 l. for his moiety, including his 530 l. It had been proper to have made H. a party, the said estate having been in mortgage to him for the said 600 l. and 530 l. and not yet assigned.

So though articles were entered into, but being gained by

11. It was said, that an *extravagant bargain* ought not to be carried into *execution* in equity. Arg. 9 Mod. 152. Trin. 11 Geo. 1. in case of Charles v. Andrews.

fraud and circumvention, yet though there was not full proof of fraud, yet it appearing to be an unreasonable and shameful contract, as to grant a lease for 67 l. per ann. of lands which were leased out again for 167 l. without any hazard or expence, Lord C. Macclesfield would not decree a specific execution, but dismissed the bill, and left the plaintiff to recover what he could at law. Ch. Prec. 538. pl. 333. Mich. 1720. Young v. Clerk.

12. A written agreement being unreasonable, the Court would not carry it into execution, but decreed that it be delivered to the party for whose benefit it was designed, that he may have an opportunity to *make the most of it at law*. MS. Tab. February 27th, 1726. Squire v. Baker.

13. A bargain being hard and unreasonable is a reason sufficient why Chancery will not give it assistance, as in the principal case, where a *young gentleman that has a remainder in tail* *possessant*

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*on the death of his uncle without issue, and expectant on the death of his father, of the value of 300 l. a year, sells this remainder for 300 l. Two manors are inserted in the deed, and it was agreed on all hands that it was designed the defendant should have but one of them. The one did not know what he * sold, and the other did not know what he bought; such a contract never was affirmed, and there can be no ground to give relief to such a purchaser; per Ld. Chancellor. Barnardiston's Chan. Rep. 341. Hill. 1740. Barnardiston v. Lingwood.*

(Q) Moderated.

1. **A.** Placed his son as clerk to B. an attorney, and gives with him 120 l. and B. by articles agrees with A. to return 60 l. of the money if B. died within a year. B. was sick at the time, and of that sickness died in three weeks after sealing the articles, and payment. Jeffries C. decreed 100 guineas to be paid back to A. Vern. 460. pl. 437. Trin. 1687. Newton v. Rowse.

2. Though by a deed 5 l. per cent. was directed to be allowed until a purchase made, yet it appearing that the money had been placed in the government funds which yielded but 4 l. the Court reduced the interest to 4 l. per cent. Decreed by Sir Joseph Jekyl Master of the Rolls. 3 Wms.'s Rep. 227. Mich. 1733. in case of Lechmere v. Lord Carlisle.

(R) Not strictly performed. Relieved; in what Cases.

1. **W**HERE a greater sum is due by specialty, and a less agreed to be taken for it, to be paid in certain sums at certain days, if the agreement be not strictly pursued, and the monies paid precisely at those days, but part of the money paid at other days, a court of equity ought not to oblige him that made that agreement (in favour of the person failing to perform it) to stand to it upon payment of so much as will make up the money paid since the last agreement, with damages for the same from the respective times the same should have been paid by that agreement to the times the same were paid, and damages for what remains unpaid till the same be paid. Arg. Chan. Cases, 110. Trin. 20 Car. 2. in case of Delamere v. Smith.

If a creditor agrees with his debtor to take less than his debt, so that it be paid precisely at such a day, and the creditor fails of payment, he cannot be relieved; for per Lord Keeper, ejus est dis-

ponere. 1 Vern. 210. Mich. 1683. Sewell v. Mason,

2. *Promise to deliver up a bond, upon a condition which was afterwards performed; decreed to deliver up the bond, though the thing done did not amount to the sum due. N. Ch. R. 128. 21 Car. 2. Booth v. Sanctry.*

3. *One that could read made an agreement for a lease for 21 years; the lessor himself drew the lease but for one year, and read it for 21 years,*

years, and after the expiration of a year ejected the lessee; and he brought a bill in Chancery to be relieved upon all this matter which was in proof, but it was *dismissed with costs*, for it was within the statute of frauds and perjuries, &c. and, being able to read, it was his own *folly*; otherwise if he had been *unlettered*. Skin. 159. pl. 6. Hill. 35 & 36 Car. 2. in Canc. Anon.

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4. *Lessee* for a long term of years *covenants to lay out 200 l. upon the premises within the first 10 years*; he fails to do it, and after 30 years were expired *lessor brings action of covenant, and recovers 150 l. damages*. *Ld. Keeper*, I think that the jury dealt very hard with Mr. Barker, to give such great damages, and to put him to make a precise proof that the whole 200 l. was laid out, when it ought rather to have been presumed it was, the defendant having brought no action in 20 years time after the money ought to have been laid out, but the jury having thought fit to give such damages, there is no ground for me to mitigate them, nor to decree the monies to be laid out on the premises; for if it had been laid out when there was 30 or 40 years to come in the lease, the lessee would have taken care to have laid it out in lasting improvements, which it may be, now his lease is near out, he would not do, and therefore *dismissed the bill*. Vern. 316, 317. pl. 313. Pasch. 1685. Barker v. Holder.

5. *Merchant hired a ship to freight at 3 l. per ton*; afterwards an embargo for 6 weeks was laid on all merchants' ships, after which the ship went the voyage, where the owner agreed with the merchant's factors at a double price, taking no notice of any agreement with the merchant; per Cur. the owner was *at liberty to make a new agreement*, because the performance of the first was obstructed by the embargo after laid on all merchants' ships. 2 Vern. R. 242. Mich. 1691. Draddy v. Deacon.

For more of Contract and Agreement in general, see *Actions, Covenant, Extinguishment, Fraud, Grants, Mortgage, Mortgage, Vendor and Vendee*, and other proper titles.

(A) Contra Formam Statuti.

1. **I**F an offence be at common law, and also prohibited by statutes, the indictment may conclude *contra formam statuti, or statutorum*; thus, in *barrettry*, though there be no direct statute against it by that name, yet the general tenor of the several acts running

running against it by circumlocutions, the indictment concluding contra formam statuti, or diversorum statutorum, is good, and it is the usual form. 2 Hale's Pl. C. 191. cap. 25. Mich. 31 and 32 Eliz. B. R. Croke, n. 14. * Burton's case. Hill. 9 Car. 1. B. R. † Chapman's case; but it must conclude also contra pacem. Mich. 6 Car. B. R. † Periam's case.

* Cro. E. 148. pl. 14.
† Cro. C. 340.
‡ 2 Roll. Abr. 82. pl. 5.

2. P. was indicted upon the statute of 5 E. 6. cap. 4. for *drawing his dagger in the church* of B. against J. S. and does *not say* (according to the statute) *to the intent to strike him*; for this cause it was void; but then it was moved, if this were not good as for an assault, that he might be fined upon it; but per Curiam it is void in all; for being indicted upon the statute, it is void as to an offence at the common law. Cro. E. 231. pl. 23. Pasch. 33 Eliz. B. R. Penhallo's case.

S. C. cited by Holt Ch. J.
1 Salk. 212.
— S. C. cited per Holt Ch. J. Comb. 421.
— 2 Hale's Pl. C. 171.
cap. 24. cites S. C.

3. In an indictment on the statute of 8 H. 6. the *statute* was *misrecited*, and the conclusion was contra formam statuti, and therefore held insufficient; but then it was moved, that though the indictment was void for the entry with force, yet it being that they with others riotose and routose entered, &c. it should be good for the riot; but Curia contra; for the indictment beginning with the statute of 8 H. 6. and concluding contra formam statuti, *this can have no relation to any offence except upon this statute*. Cro. E. 307. pl. 10. Mich. 35 & 36 Eliz. B. R. Hall v. Gawen & al'.

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2 Hale's Pl. C. 171, 172. cites S. C.

4. *Information upon the statute 33 H. 8. cap. 16. and 1 E. 6. cap. 6. for buying of worsted yarn, not being a weaver*, and the information concluded contra formam statuti; it was said it was not good, but it ought to be contra formam *statutorum*; but the Court as to that held it good, but because he did not shew in his information, that it was not yarn spun upon the rock (for otherwise it is not an offence), it was held the information was not good. Cro. E. 750. pl. 6. Pasch. 42 Eliz. B. R. Dingley v. Moore.

If one statute be relative to another, as where the former makes the offence, the latter adds a penalty, as the statutes of 1 & 23 Eliz. the indictment ought

to conclude contra formam *statutorum*. 2 Hale's Pl. C. 173. cap. 24. cites Pasch. 42 Croke, n. 6. Dingley v. Moore.

D. 347. pl. 9. contra. Topcliff v. Waller, cites 5 H. 7.—

5. Where there are *several statutes*, and it does not appear on which the *information* is founded, the concluding contra formam statuti is ill. Crq. J. 142. pl. 19. Mich. 4 Jac. B. R. Broughton v. Moor, cites it as adjudged in the case of Talbot & al'.

If there are *divers statutes* in the point of *information*, contra formam *statuti* is good; because the best shall be taken for the king; per Coke. Ow. 135. Trin. 9 Jac. cites New Book of Entries, 182. and 5 H. 7. 17. and 8 E. 3. 47. 2.

6. Where *one act makes the offence*, and *another gives the penalty*, an information must be contra formam *statutorum*, and cited 33 Eliz. Talbot v. Sheldon, who were indicted for recusancy contra formam *statuti*, 23 Eliz. and the judgment was reversed because the penalty was demanded; for the 10 Eliz. made the offence, and the 23d gave the penalty; but if the information be

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for the offence only, it had been good; per Coke. Ow. 135. Trin. 9 Jac.

2 Hale's Pl. C. 191. cap. 25. says, that it is the usual course at this day, to conclude such an indictment contra formam statuti, and that it has been ruled good accordingly; and cites this case of Bradley v. Banks, but says, that it is not there questioned but that it may be good without it, so that in these cases, where clergy is specially ousted by an act of parliament, the indictment is good with this conclusion, or without it, but the best way in these cases is to follow what is most usual.

7. In *appeal of death*, the defendant pleaded that he was indicted and convicted, &c. and prayed his clergy. The appellant demurred, alleging that the conviction was not lawful, because the indictment was, *that he stabbed him, having no weapon drawn, nor striking him, and so killed him contra formam statuti*, whereas there is not any statute which prohibits it, but only takes away the clergy from such offender; and the verdict finding that he was guilty of homicide against the statute, is not good for that reason; sed non allocatur; for the indictment being framed upon the statute, the conclusion is good, and their verdict is pursuant thereof. Cro. J. 283. pl. 4. Trin. 9 Jac. B. R. Bradley v. Banks.

8. If the former statute be discontinued, and revived by another statute, the best way is to conclude contra formam statutorum. Mich. 31 & 32 Eliz. MILL'S CASE; though there is good opinion that it is good enough to conclude contra formam of the first statute, as in case of the statute of 5 E. 6. of *ingrossing*, 37 H. 8. [553] for *usury*, and 5 Eliz. for *perjury*, which were discontinued and revived, yet indictments good concluding contra formam of the first statute. 2 Hale's Pl. C. 173. cap. 24. cites Trin. 9 Jac. Rot. 124. C. B. Westwood's case.

9. If it be a general statute it need not be recited, but if sufficient to conclude contra formam statuti in hujusmodi casu edit' & provis', for the Court ought to take notice of it; and all penal statutes that induce a forfeiture to the king, or make a felony or treason, are general statutes, because it concerns the king; but if a general statute be recited in an indictment, and be misrecited in a point material, and concludes contra formam statuti prædicti, it is fatal, and the indictment shall be quashed; but it seems, if it concludes generally contra formam statuti in hujusmodi casu edit' & provis', it is good; for the Court takes notice of the true statute, and will reject the misrecital as surplusage. 2 Hale's Pl. C. 172. cap. 23. cites Mich. 7 Car. B. R. Croke, n. 14.

* Cro. C. 234. pl. 14. * Barn's case in maintenance, and Mich. 8 Car. B. R. per Jones super stat' de Cottages.

10. An indictment of *forcible detainer* concluded contra formam statuti; exception was taken that it ought to be *statutorum*; for the statute of 8 H. 6. cap. 9. is relative to the statute of 15 R. 2. cap. 2. and recites it; and then the words are joined thereto, the case of peaceable entry, and forcible detainer, and so this statute is but supplemental of the other; but to this it was answered, that this statute first recounts the defects of the statute of 15 R. 2. and then confirms it, and after provides for the case of peaceable entry and forcible detainer, to which the statute of 15 R. 2. did not intend, so that as to this clause it is a new distinct law, and consequently the indictment good. But to that it was replied, that the sta-

tute 8 H. 6. goes on and provides, that in case of forcible detainer, after complaint made to the justices of peace, they shall cause the statute 15 R. 2. to be duly executed; by which statute the offender is to be fined and imprisoned, so that *this statute grants only restitution, and refers the punishment to the statute of 15 R. 2.* So then upon this indictment contra formam statuti, taking it to be that of 8 H. 6. as it must be, the offender cannot be punished within that of 15 R. 2. and the king should lose his fine; and for this cause, after several debates, Roll held the indictment insufficient, but Bacon e contra, because the ancient precedents both of the indictments and actions upon the statute did use to recite this statute only, but now the course according to Lord Coke's advice, 4 Rep. 486. not to recite the statute but conclude it contra formam statuti; see Dalton, cap. 122. And he said it would be very mischievous to subvert so many precedents as have been this way, but the best way had been to have wrote it statut' with a dash, for then it would have stood by law as it ought. All. 49, 50. Hill. 23 Car. B. R. Simond's case.

11. *P. and H. and one J. S. were indicted at the assises at Nottingham upon the statute 1 Jac. cap. 8. for stabbing one W. R. and the indictment was, that J. S. stabbed him, and P. and H. were present, abetting, &c. and contra formam statuti; the Court held the indictment need not conclude contra formam statuti, because the statute does not alter the nature of the offence, but only takes away the privilege which the common law allowed in such case, and therefore it is sufficient that the circumstances be expressed in the indictment, whereby it may appear that the offence is within the statute; and the offenders had their clergy, and upon their reading were burnt in the hand in conspectu Curie.* All. 43, 44. Hill. 23 Car. B. R. Page and Harwood.

2 Hale's Pl. C. 190, 191. cites S. C. — S. C. cited by Holt Ch. J. 12 Mod. 122. Pasch. 9 W. 3. — 5 Mod. 307, 308. S. C. cited, and that they were all found guilty, when it is

plain that he only could be so that gave the stroke, yet that judgment was held good, because they might have been found guilty at the common law upon the same indictment, for the statute does not alter the nature of the offence, but takes away the privilege of the clergy allowed by law, and need not conclude contra formam statuti. — S. C. cited by Holt Ch. J. Ld. Raym. * Rep. 150. — S. C. cited by Holt Ch. J. 1 Salk. 212, 213. — S. C. cited by Holt Ch. J. Comb. 421. — And an indictment on the statute of stabbing need not conclude contra formam statuti; per Holt Ch. J. Comb. 218. Mich. 5 W. & M. in B. R. Anon. — The statute of stabbing does not make the offence, but only takes away the clergy from manslaughter so circumstantiated; yet the indictment may conclude contra formam statuti; but it is good without such conclusion; per Holt Ch. J. Comb. 371, 372. cites Hale's Pl. C. [8vo.] 58.

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12. If a man be indicted for an offence which was at common law, and concludes contra formam statuti, but in truth is not brought by the indictment within the statute, it shall be quashed, and the party shall not be put to answer it as an offence at common law. 2 Hale's Pl. C. 171. cap. 24.

13. If an act of parliament making a felony or other offence be but temporary, and made perpetual by another statute, the indictment concluding contra formam statuti is good. 2 Hale's Pl. C. 172. cap. 24.

14. If an offence be newly enacted, or made an offence of an higher nature by act of parliament, the indictment must conclude

Si 2

contra

Contra Formam Statuti.

contra formam statuti, as an indictment of *buggery, transporting of wool, &c.* 2 Hale's Pl. C. 189. cap. 25.

15. *Rape*; though before the statute of Westm. 2. it *was a trespass*, yet being *made felony* by that statute, the indictment ought to conclude contra formam statuti. 2 Hale's Pl. C. 189. cap. 25.

16. If an offence were high treason, &c. at the common law, and a declarative act of parliament declares it so, as the statute of 25 E. 3. de proditionibus, the statute of 3 H. 5. of *clipping the coin*, &c. till repealed by 1 Mar. the indictment is good with a conclusion contra formam statuti, or without such a conclusion. 2 Hale's Pl. C. 189. cap. 25.

17. But at this day the indictment for *clipping, washing, &c. of coin* enacted to be treason by the statutes of 5 & 18 Eliz. must not only express, as the statute requires, that it was (*causa lucri*) but must conclude contra formam statuti. 2 Hale's Pl. C. 189, 190. cap. 25.

18. If an offence were *felony at common law*, but a *special act of parliament* ousts the offender of *some benefit* (that the common law allowed him) when certain circumstances are in the fact, though the body of such indictment must express those circumstances according as they are prescribed in the statute, yet the indictment must not conclude contra formam statuti. 2 Hale's Pl. C. 190. cap. 25.

19. Thus the statute of 21 Jac. cap. 27. concerning *murdering of bastard children* requires proof by one witness that the child was dead born, the indictment must shew that it was a bastard child to bring the offender within that statute; but concludes not contra formam statuti. 2 Hale's Pl. C. 190. cap. 25.

20. By the statute of 8 Eliz. cap. 4. in cases of *pickpockets*, 39 Eliz. cap. 15. *breaking houses in the day-time, and stealing to the value of 5 s.* the statute of 23 H. 8. cap. 1. in cases of *petit treason, wilful murder*, of malice prepense, *robbing in or near the highway*, 18 Eliz. cap. 7. in case of *burglary*, the statute of 4 & 5 P. & M. cap. 4. in case of *malicious commanding, &c. any person to commit murder, robbery, wilful burning*, the offenders are *ousted of their clergy*; the body of the indictment must bring them within the express purview of the statutes, or otherwise they shall have the benefit of clergy, but it need not conclude contra formam statuti, neither is it usual in such cases; for they were felonies before, and the statutes do not give them a new punishment, nor make them to be crimes of another nature, but only in certain cases take away clergy; but yet if they should conclude in these cases contra formam statuti, it would not vitiate the indictment, but would be only surplusage, for *though the statutes do not give a new penalty, yet they take away an old privilege*, when the case falls within the circumstances mentioned by the act. 2 Hale's Pl. C. 190. cap. 25.

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21. If an offence be at common law, and also prohibited by statute, with a corporal or other penalty, yet it seems the party may be indicted at common law, and then though it concludes not contra formam

formam statuti, it stands as an indictment at common law, and can receive only the penalty that the common law inflicts in that case. 2 Hale's Pl. C. 191. cap. 25.

22. Mich. 10 Jac. B. R. an indictment of *forcible entry* upon the statute of 8 H. 6. cap. 9. and Mich. 9 Car. 1. B. R. an indictment for *forgery* quashed for not concluding contra formam statuti, * SMITH'S CASE, yet both these were offences at common law, though restitution were not at common law in the first case, nor pillory and loss of ears in the second, but only fine and imprisonment, or at most standing in the pillory, but without mutilation. 2 Hale's Pl. C. 192. cap. 25.

* See Indictment (O) pl. 2. S. C.

23. Regularly, if a statute only makes an offence or alters an offence from one crime to another, as making a bare *misfeasance* to become a felony, the indictment for such a new made offence, or new made felony must conclude contra formam statuti, or otherwise it is insufficient. 2 Hale's Pl. C. 192. cap. 25.

24. And on the other side, if an offence be purely at common law, if it conclude contra formam statuti it is insufficient, and shall be quashed except in the instance above given touching clergy; and therefore an indictment of *battery* concluding contra formam statuti is insufficient, and shall be quashed. 2 Hale's Pl. C. 192. cap. 25. cites Trin. 12 Car. B. R. Croke, n. 2. Cholmley's case.

Cro. C. 465. pl. 2.

25. There is a difference when an *information* or *action* is grounded on an act of parliament, and the conclusion is contra formam statuti prædicti, there the information is not good if the statute is *misrecited*, but if the conclusion be contra formam statuti in *hujusmodi casu editi & provis*, there it may be good, notwithstanding the misrecital, because the Court can take notice of a good act of parliament to punish the offence mentioned; per Twissden J. Raym. 192. Mich. 22 Car. 2. B. R. in case of the King v. Wild.

26. W. brought an *action* against H. R. *de uxore abducta, and keeping of her from him*, usque such a day, which was some time after the exhibiting of the bill, and concluded contra formam statuti. After verdict for the plaintiff this was moved in arrest of judgment, but the declaration was held good notwithstanding the *impertinent conclusion* of contra formam statuti, *there being no statute in the case*. Vent. 103, 104. Mich. 22 Car. 2. B. R. Ward v. Rich.

27. Where a statute continued *de tempore in tempus*, and was never discontinued nor determined, there it shall be said contra formam statuti; agreed. Ow. 135. and cites 35 Eliz. and 9 Eliz. Palmer's case.

28. Where a statute prohibits a thing without a penalty, or makes a new duty to an officer, the indictment needs not conclude contra formam statuti; per Eyre J. Comb. 205. Pasch. 5 W. & M. in B. R. The King and Queen v. Wiggot and Perry.

29. Where a statute makes an offence, the conclusion must be contra formam statuti. 5 Mod. 308. Mich. 8 W. 3. Bennet v. Talbot.

An indictment for a riot is good, though it conclude not contra formam statuti,

because an offence at common law, though prohibited also by acts of parliament under severer penalties. 2 Hale's Pl. C. 190. cites Pasch. 5 Jac. B. R. Wormail's case.

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1 Salk. 212. pl. 2. Hill 8 W. 3. B. R. the S. C. adjudged for the plaintiff.

30. An indictment for a riot was moved to be quashed, because it concluded contra formam *diversorum statutorum*, whereas there is but one statute against riots, the rest give penalties on sheriffs, juries, &c. but held good. Comb. 371. Trin. 8 W. 3. B. R. The King v. Brane & al'.
31. If a declaration is contra formam statuti, and *some things alleged therein are within the statute mentioned, and others are not* within it, yet it is good; for as to those which are not, it is surplusage. 12 Mod. 121. Pasch. 9 W. 3. Bennet v. Talboys.
5 Mod. 307, 308. Bennet v. Talbot. S. C. adjudged nisi. — Carth. 182. S. C. and the action which was founded on the new statute (there being other statutes before) against hunting by inferior tradesmen, the words contra formam statuti shall be applied to that part of the trespass which was grounded on the new statute, which gives full costs, though the damages are under 40 s. And per Holt Ch. J. it is sufficient to lay in the declaration, that the defendant hunted in the plaintiff's ground, without concluding contra formam statuti; for that should come in evidence. — Ld. Raym. Rep. 149, 150. S. C. adjudged nisi, and afterwards adjudged absolutely for the plaintiff. — Comb. 420. S. C. adjudged upon the reason given by Holt Ch. J. viz. that the conclusion should refer only to that which would reasonably bear it, and upon the authorities of All. 43. and Vent. 104.

1 Salk. 212. pl. 2. S. P. by Holt Ch. J. accordingly, and says this was Per aliorum's case.

32. If an act of parliament increases a penalty, or deprives a man of any benefit which he had before at common law, there if you count on the statute, and do not bring yourself within it, and conclude contra formam statuti, it is naught; per Holt Ch. J. 12 Mod. 122. Pasch. 9 W. 3. in case of Bennet v. Talbois. Cro. E. 231.

33. In case, plaintiff declared that he *distraigned certain cocks of hay for arrears of rent, in order to sell them secundum leges et statuta regni Anglie; and that the defendant, being possessor of the premises, refused them, &c.* After verdict for the plaintiff, he prayed his treble damages upon the statute of 2 W. & M. cap. 5. and insisted that though the plaintiff does not recite the statute, nor conclude contra formam statuti, yet it is well enough, because it is a general statute, and the distress is of such a thing as was not distrainable for rent at common law, and therefore secundum leges et statuta refers to this statute of W. & M. sed non allegatur; for per Curiam, the plaintiff does not bring himself within the compass of the statute, for he does not shew that the distress was appraised, nor conclude contra formam statuti; and when secundum leges & statuti is rather where a thing is proper by the common law, and confirmed by statute; and adjudged accordingly. Ex relatione m^{ri} Daly. Ld. Raym. Rep. 342. Pasch. 10 W. 3. Anon.

Nor will the concluding of the indictment contra formam statuti,

bar the party from supporting the indictment by the common law, if it could be maintained upon the statute. 10 Mod. 336. Trin. 2 Geo. 1. B. R. in case of the King v. Dixon.

34. Where a statute takes notice of a common offence, and adds a further penalty, an indictment thereupon may well be laid contra formam statuti; per Cur. 6 Mod. 17. Mich. 2 Ann. B. R. in the case of the Queen v. Bothell.
Wherever there was an offence at common law, and a statute makes a further provision of penalty, an indictment for that offence may conclude contra formam statuti, or leave it out at election; per Holt Ch. J. Pasch. 13 W. 3. in case of the King v. . . .

35. Where

35. Where a statute introduces a *new law*, by giving an action where there was none before, or by giving a new action in an old case, the plaintiff need not conclude contra formam statuti; but if a statute gives the *same action with a difference of several circumstances*, as double damages, &c. the plaintiff must either conclude contra formam statuti, or make his case so particularly within the statute that it may appear to be so; per Cur. 2 Salk. 504. pl. 3. Hill. 5 Ann. B. R. Coundell v. John.

or an *old remedy in a new case*, you need not conclude contra formam statuti. — If an act of parliament * increases a penalty, or deprives a man of any benefit which he had before at common law, then if you count on the statute, and do not bring yourself within it, and conclude contra formam statuti, it is naught; per Holt Ch. J. 12 Mod. 122. in case of Bennet v. Talboys.

Per Holt Ch. J. Holt's Rep. 634. Kendall v. Clerk, S. C. that where an act of parliament gives a new remedy in an old case,

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For more of Contra Formam Statuti in general, see Indictment (O), Robbery (S), and other proper titles.

(A) Contra Pacem.

1. **W** RIT of *rescous* made against bailiffs in collecting toll, and *quod solvere tolnetum contradixerunt contra pacem*, and yet adjudged good. Thel. Dig. 114. lib. 10. cap. 24. f. 5. cites Mich. 30 E. 3. 20.

2. *Writ of attachment upon a prohibition for a suit in Court Christian of a thing temporal* was contra pacem, and held good. Thel. Dig. 114. lib. 10. cap. 24. f. 9. cites Mich. 31 E. 3. Attachment upon a prohibition 8 E. but says the Register is contra prohibitionem nostram only, and adds *quære*.

3. A writ of prohibition to a suit in Court Christian was served on the now defendant, who flung it into the dirt, and trampled upon it, and afterwards prosecuted the suit in Court Christian; the writ against the defendant was contra pacem. Register, 95. a. b.

Thel. Dig. 114. lib. 10. cap. 24. f. 7. cites the Register, and says it shall be contra pacem.

4. Writ upon the case for *not cleansing and repairing a ditch*, &c. shall be without contra pacem. Thel. Dig. 114. lib. 10. cap. 24. f. 12. cites Trin. 45 E. 3. 17.

abated. Br. Action sur le Case, pl. 20. cites S. C.

5. And so it shall be for *every non-feasance*. Thel. Dig. 114. lib. 10. cap. 24. f. 12. cites 12 H. 4. 3.

6. A man shall have writ of *trespass contra pacem E. nuper regit Anglia, & contra pacem nostram*. Thel. Dig. 115. lib. 10. cap. 24. f. 15. cites Hill. 11 H. 4. 15. Mich. 2 E. 4. 25.

S f 4

7. Writ

Contra Pacem.

7. Writ of *reception* shall be *contra pacem* and against law and statute, but not *vi et armis*; per Babington. Thel. Dig. 115. lib. 10. cap. 24. f. 17. cites Pasch. 9 H. 6. 1. But says, the form of the Register 86 is, after reciting the fact, *et quia hoc injustum est & manifeste contra pacem nostram, tibi præcipimus, &c.* And other writs are in contemptum præceptorum nostrorum, &c.

a Hale's Pl.
C. 189.
cites S. C.
—2 Hawk.
Pl. C. 245.
cap. 25.
f. 95. S. P.
accordingly,
and cites in
Marg. S. C.
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8. Indictment for *erecting a wear over the river Wyre*, whereby the subjects were hindered of their passage with their boats, *laid it to be done 43 Eliz. with a continuance ad nocumentum of the subjects of King James*, and so the jurors concluded *that the wear was erected and continued contra pacem regis nunc, &c.* and adjudged void, because it is as well *contra pacem nuper reginæ*, as *contra pacem regis nunc*; for the commencement * of the tort was in the queen's time, and this was an offence to the crown now; for though the parties might be indicted for the continuance only, without alleging expressly the commencement, yet the scope of this indictment is not to make the offences several, as in themselves they are; for though the jurors have concluded upon both, yet they have found the peace of this king only broken. Yelv. 66. Trin. 3 Jac. B. R. Sir Edward Winter's case.

9. But per Popham Ch. J. if the conclusion of the jury had been upon the continuance of the tort only, then it should be taken in law to be an indictment to this purpose only, and the other matter of the finding the erection of the wear to be only by way of information, how the thing was done; or if the jurors had found that the defendant in the queen's time had erected, &c. and continued it in the time of this king, *contra pacem regis nunc*, it had been good; because the express matter found was only the continuance of the tort, and the other only a recital or introduction to the matter found; quod curia concessit. Yelv. 66. Trin. 3 Jac. B. R. in Winter's case.

10. An indictment of forcible entry was quashed, because it did not conclude that it was *contra pacem*. 2 Bullf. 258. Trin. 12 Jac. The King v. Cox.

Roll. Rep.
259. pl. 30.
Cuddington
v. Wilkins,
S. C. ad-
judged ac-
cordingly,
and Coke
Ch. J. said,

11. Trespass was laid of entering his close 10th July, 44 Eliz. *contra pacem domine regine, & domini regis nunc*; after verdict this was moved in arrest of judgment, and held that the words (*domini regis nunc*) are but *surplusage*; whereupon the plaintiff had judgment. Cro. J. 377. pl. 3. Mich. 13 Jac. B. R. Cuddington v. Wilkin.

that if part of a trespass is committed in the queen's time, and part in the king's time, then it ought to be alleged against the peace of both.—3 Bullf. 82. S. C. adjudged for the plaintiff accordingly, and same difference taken by Coke Ch. J.—2 Hale's Pl. C. 189. cap. 25. cites S. C. and says, that so it is in case of an indictment for an offence so alleged.

12. One was indicted of being a *common barretor*, but the indictment omitted the words *contra pacem domini regis, vel contra formam statuti*, and therefore it was held to be insufficient; for it is an essential part of the indictment, and therefore was reversed. Cro. J. 527. pl. 4. Pasch. 17 Jac. B. R. Palfrey's case.

13. Regularly

13. Regularly every indictment ought to conclude contra pacem domini regis, for that is not taken away by the statute of 37 H. 8. cap. 8. and therefore an indictment without concluding contra pacem, &c. is insufficient, though it be but for *using a trade, not being an apprentice*; 2 Hale's Pl. C. 188. cap. 25. cites Hill. 21 Car. B. R. For every offence against a statute is contra pacem, and ought to be so laid.

14. An indictment that *concludes contra pacem*, and *says not domini regis*, is sufficient. 2 Hale's Pl. C. 188. cap. 25. cites Mich. 23 Car. 1. adjudged.

15. If A. be indicted for an offence supposed to be committed in time of a former king, and *concludes contra pacem domini regis nunc*, it is insufficient; for it must be supposed to be done contra pacem of that king in whose time it was committed. 2 Hale's Pl. C. 188, 189. cap. 25.

16. But if a man be indicted in the time of one king, *contra pacem domini regis nunc*, he may be arraigned for that offence in the time of his successor. 1 E. 6. Br. Corone, 178. Enditement, 44. Neither is the indictment itself discontinued by the demise of the king, though in some cases the process be. 2 Hale's Pl. C. 189. cap. 25. cites 7 Co. Rep. 30, 31.

17. Two indictments on the stat. 5 Eliz. cap. 4. for *using the trade of a tallow chandler* were quashed, because they did not conclude contra pacem. Keb. 789. pl. 43. Mich. 16 Car. 2. B. R. The King v. Harris.

exception was taken to the indictment for omitting contra pacem. Holt Ch. J. thought it well enough, because it concluded contra formam statuti; but by the other three justices it was quashed; for every breach of a law is against the peace, and ought to be so laid. 6 Mod. 128. Pasch. 3 Ann. B. R. The Queen v. Lane. — 3 Salk. 190. pl. 17. S. C. accordingly, and Holt Ch. J. said, it would be hard to make a barber's shaving a man by consent to be contra pacem. But the indictment was quashed.

So for using the trade of a barber, without serving seven years, ex-

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18. An information was brought by a common informer for exercising the trade of a barber; exception was taken, because it did not say contra pacem; but per Curiam, that is never done in a suit by a common informer. Keb. 860. pl. 70. Hill. 16 & 17 Car. 2. Lufamoore's case.

cedents, that neither an information qui tam on a penal statute, nor an information by the king for an intrusion, or other wrong of civil nature done to his lands, goods, or revenues, need the words contra pacem.

2 Hawk. Pl. C. 343. cap. 25. f. 94. says it seems clear, from all the pre-

19. An indictment of battery concluded only to the great disturbance of the peace of our lord the king, but because it did not say contra pacem it was quashed. 2 Keb. 36. pl. 72. Pasch. 18 Car. 2. B. R. The King v. Hooker.

20. An indictment for retaining a servant without a testimonial from his last master, wanted the words contra pacem, and it was quashed. Mod. 78. pl. 39. Mich. 22 Car. 2. B. R. Anon.

21. Trespass for breaking, entering, and depasturing 36 Car. 2. continuando the depasturing till the 4 Jac. 2. contra pacem domini regis nunc, which was K. James the 2d. This was held naught; for that is no contra pacem to the trespass tempore Caroli Secundi,

Show. 27. S. C. & S. P. adjudged. — Comb. 166, S. C. & S. P. ruled ill; but

for *contra pacem* refers to the trespass, and not to the *continendo*, and then it is as if no *contra pacem* had been at all, which is substance, and had upon a general demurrer; and that it is substance is proved by the 16 & 17 Car. 2. which by express words aids it after verdict; so that it appears by this statute, that it was not aided by verdict before that statute, which it would have been if it had been but form. The common way is to conclude *sam contra pacem dicti nuper regis quam domini regis nunc.*

22. *Trespass quare vi & armis* 1 Feb. 1701. Clausum suum fregit *contra pacem domine Anne nunc regine*, &c. Adjudged on demurrer for the defendant; for K. William died 8 Mar. 1701, and so it was *contra pacem regis*, and not *contra pacem reginæ*; the omission of *contra pacem* had been only matter of form, but here it is repugnant; for the Court must take notice of the demise of the king, that is, the description of the trespass, and a trespass done *contra pacem regis* could not be given in evidence; but indeed a verdict would have aided it. 2 Salk. 640. pl. 11. Mich. 2 Ann. B. R. Day v. Muskett.

23. A constable was indicted for not returning the warrant of a justice of peace to levy the penalty on a conviction of deer-stealing. Exception was taken that it was said *contra pacem* of the late king, and that it ought to be *contra pacem* of the queen also; because the neglect, though it began in the king's time, yet it continued in the queen's time also, the return being never made at all, and so was an offence against both the king and queen. But Holt Ch. J. said, he supposed it would be necessary to say *contra pacem* of the queen as well as the king where that is necessary; but here the indictment being founded on an omission, it is otherwise, and there you never conclude *contra pacem* at all. Fortescue's Rep. 127. Trin. 3 Ann. B. R. The Queen v. Wyat.

1 Salk. 380. pl. 28. S. C. the Court held, that *contra pacem* was surplusage, and could neither do good nor harm, because it was a non-essence.— 11 Mod. 53. pl. 30. Pasch. 7 Ann. B. R. S. C. & S. P. accordingly.

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24. Serjeant Hawkins says it seems to be a good general rule, that no indictment or information for an offence, capital or not capital, against the common law or statute can be good unless it expressly supposes such offence to be done against the peace of the king or kings in whose reign or reigns it was committed; and accordingly he says he finds, that every precedent of an indictment in Coke's Entries, whether for treason or felony, or inferior offences, expressly lays the offence against the peace of the king, except only in four instances, whereof one is of an indictment for a nuisance for not repairing the highway, which, if it may be maintained, seems to depend chiefly on this reason, viz. that the offence is of such a nature, that a man may be as well guilty of it in his own ground as that of another, and therefore it has been held, that it need not be laid against the peace, because the laying it in such a manner may seem to imply somewhat of force or trespass against the person or possessions of another; but it seems difficult to reconcile this opinion with those many resolutions taken notice of in the following part of this section, by which indictments for want of those words *contra pacem*, have been adjudged insufficient, where the

the offences could, on no other account, be said to be against the peace, than as they were breaches of the law, as all nuisances certainly are.

And one other of the said instances in Coke's Entries is of an indictment of *homicide by misadventure*, and one other of an indictment of homicide in *self-defence*; but these precedents, if they may be maintained, seem to depend chiefly on this reason, that such offences are supposed to be *owing rather to the misfortune, than fault, of the party*.

And the 4th of the said instances is of an indictment of *perjury on the statute*, which concludes in *contemptum reginæ, &c. & contra formam statuti*, without adding *contra pacem*.

But Rastal's Precedents, both of indictments of felony, and of inferior offences, do as often omit the words *contra pacem*, as make use of them. However, certainly the much greater number of precedents expressly conclude *contra pacem*, and the authority of these is much strengthened by those many cases in the reports, wherein indictments and informations appear to have been quashed for want of the words *contra pacem*; as indictments and informations for *barretrie, forgery, retaining a servant without a testimonial from his last master, following a trade without having served an apprenticeship, erecting a cottage, assault and battery, &c.* 2 Hawk. Pl. C. 243. cap. 25. s. 94.

See the pleas above.

For more of *Contra Pacem* in general, see *Indictments*, *Crif.* also (Q. 2, 5), and other proper titles.

Contribution and AVERAGE.

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(A) In what Cases. And how; in Proportion.

1. **A**VERAGE is commonly used by the law merchant for *that contribution which merchants and others make towards losses sustained, where goods are cast into the sea, for the safeguard of the ship, or of the other goods, and lives of the persons therein during the tempest*; and it is called average and contribution because it is proportioned and allotted after the rate of every man's goods aboard. Law of Trade and Commerce, 112.

2. *All the parties interested are to bear the loss by a general contribution, and a master or purser of a ship, shall contribute for the preservation thereof; also the passengers, for such things as they have*

Contribution and Average.

have in the ship, be they precious stones, pearls, or the like; and where passengers have no goods in the ship, in regard they are a burden to it, it is said an estimate shall be made of their apparel, rings, jewels, &c. towards a contribution for the loss; and generally money and jewels, clothes, and all things in the ship, (except the clothes which are upon a man's body, or victuals, &c. put on shipboard to be spent,) are liable to average and contribution; and the goods lost shall be valued, and the goods and merchandize saved are to be estimated, which being known, a proportionable value shall be contributed by the goods saved, towards reparation of the goods cast overboard; and if in the casting over, or lightening of the ship, any of the remaining goods are spoiled, or receive injury, the same must come into the contribution for the damages received. Law of Trade and Commerce, 113. cites Molloy, 233. 236.

3. *If a man is bound in a recognizance and dies, there, as long as the heir has assets, execution shall be against the heir only. Br. Suit, pl. 13. cites 17 E. 2. Fitzh. Execution, 139.*

4. *But if the heir has not assets, execution shall be upon all the tenants, and every one shall be contributory to the other; but where execution is sued against the heir who has assets, he shall not have contribution against the tenants nor the feoffees. Br. Suit, pl. 13. cites 17 E. 2. Fitzh. Execution, 139.*

5. *If the heir be vouched in ward of several, and the tenant loses, and recovers in value against the heir, every guardian shall be contributory to the render in value. Br. Suit, pl. 12. cites 48 E. 3. 5.*

6. *So where feoffee of the conveyer upon a statute merchant is in execution, he shall have contribution against every other feoffee of the same conveyer. Br. Suit, pl. 12. cites 48 E. 3. 5.*

7. *And per Finchd. where the conveyer upon statute merchant alienates part of his land, and the conveyee sues execution against the conveyer, there the conveyer shall not have any contribution from the feoffee, as the feoffee might have of the other feoffee. Br. Suit, pl. 12. cites 48 E. 3. 5.*

8. *But if the conveyer dies, and the conveyee sues execution against the heir, he shall have contribution of the feoffees. Br. Suit, pl. 12. cites 48 E. 3. 5.*

[562] 9. *So that the feoffee shall have contribution from the heir, if any of them be in execution, contra of the heir. Br. Suit, pl. 12. cites 48 E. 3. 5.*

10. *If a man charges land tailed, and land of fee-simple, and dies, the land tailed is discharged, and the fee-simple land remains charged with the whole; per Skrene, which none denied. Br. Charge, pl. 9. cites 12 H. 4. 17.*

11. *In dower if the tenant vouches the heir in three several wards, each of them shall be severally charged. 3 Rep. 13. a. by the reporter, in Herbert's case, cites 11 H. 7. 22. & 48 E. 3. 5. 2. b.*

12. *Contribution shall be had by the tenants in scire facias upon recognizance by their feoffor. Br. Suit, pl. 18.*

Br. Scire
Facias,
pl. 225.

cites 17 E. 2. Fitzh. Execution, 139.

13. If the king's tenant aliens to several severally, and the king distrains the one for the whole, he shall have contribution of the others. Br. Suit, pl. 19.

Br. Appor-
tionment,
pl. 21. cites
F. N. B.
234, 235.

14. The writ of contribution lies where there are tenants in common, or who jointly hold a mill pro indiviso, and take the profits equally, and the mill falls into decay, and one of them will not repair the mill, now the other shall have a writ to compel him for to be contributory to the reparations. F. N. B. 161. (B).

15. And if there be three or four coparceners of land, and the eldest sister does the suit to the lord, of whom the lands are holden, for all the coparceners, and the others will not allow her for her charges and losses, according to the rate for the same suit, that coparcener, who did the suit, may have writ of contribution. F. N. B. 161. (C).

16. And if there be many coparceners, and the eldest does the suit, and the other coparceners agree with the eldest for a rate, now the writ of contribution shall be brought against the others who would not contribute, &c. F. N. B. 161. (C).

17. And if several be infeoffed of land, for which one suit ought to be done, &c. now if they agree among themselves, that one of them shall do the suit, and that the others shall contribute unto him, if he do the suit, and afterwards the others shall not allow him for that suit according to their rate, then he shall have the writ of contribution against them, and the writ shall mention the agreement, &c. F. N. B. 161. (C).

18. The plaintiff seeks relief by way of contribution, for that one of the defendants hath a rent-charge out of his, the plaintiff's lands, and one other of the defendant's lands, and seeks to lay the whole burthen of the rent-charge upon his, the plaintiff's lands; and because the defendant would not answer, therefore an injunction is granted for staying of the suits for the rent. Cary's Rep. 132. cites 22 Eliz. Dolman v. Vavasor & al'.

And. 125.
pl. 173.
S. C. but
not S. P.—
Mo. 191.
pl. 341.
S. C. but
not S. P.

19. The Duke of Northumberland acknowledged a recognizance of 1000 marks to the Lord Cromwell, and after granted certain lands to the defendant; afterwards both the Duke and the Lord Cromwell were attainted of treason, whereby the recognizance came to the queen, and in her name was put in suit by one Lane, to whom her majesty had granted the said recognizance, who sought to extend the defendant's said lands alone, whereas there are divers other lands to a great value in other men's hands liable to the said recognizance, therefore it is ordered that no liberate go out upon the said extent, until the Court order the same. Cary's Rep. 159. cites 21 Eliz. The Queen v. Colborne.

20. In the case of a common person, the heir of the cosutor, or of him, against whom judgment is given in debt, shall be only charged, and shall not have contribution against another tertenant in in some cases, and in some cases he shall have contribution, and shall not be solely charged; resolved. 3 Rep. 12. b. Mich. 26 & 27 Eliz. in Scacc. Harbert's case.

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21. For if a man is seised of three acres of land, and enters into a recognizance or statute, &c. and inf-ffs A. of one acre, and B. of another,

Contribution and AVERAGE.

another, and the third descends to his heir, in this case, if execution is sued only against the heir, he shall not have contribution; for he comes to the land without consideration, and the heir sits in the seat of his ancestor, & hæres est alter ipse & filius est pars patris, and therefore shall not have contribution against any purchaser, though in rei veritate the purchaser comes to the land without any valuable consideration; for the consideration of the purchase is not material in such case. Resolved. 3 Rep. 12. b. Ibid. And says, that so it was lately resolved in GAWDY'S CASE, late marshall of B. R. that the heir may be only charged, and he shall not have contribution against purchasers; for though in the case of recognizance, statute, or judgment, the heir is charged as tenant, and not as heir, as appears by 27 H. 6. Execution, 135. 15 E. 3. tit. Age, 95. because by the recognizance or statute the heir is not bound, but the conusor grants quod dicta pecuniæ summa de terris, &c. levetur, yet he shall not have contribution against a purchaser, contrary to the opinion of Finchden in 48 E. 3. fol. 5. b.

22. But yet in some cases the heir shall have contribution, and shall not be solely charged; as if a man is seized of two acres, the one of the nature of Borough-Englisb, and binds himself in a statute or recognizance, or if judgment in debt is given against him, and he dies, leaving issue two daughters, who make partition, in this case if one only is charged, she shall have contribution; for as one purchaser shall have contribution against another, and against the heir of the conusor also; so one heir shall have contribution against another heir; for they are in æquali jure, resolved. 3 Rep. 12. b. in Herbert's case.

23. If there are grandfather, father, and two daughters, and judgment is given for debt or damages against the grandfather, and he dies, and the father dies, one of the daughters being within age, and the other of full age, and partition is made, the eldest daughter shall not be charged solely, but shall take advantage of the infancy of her sister; for both heirs stand in the same degree. 3 Rep. 13. a. by the reporter in Herbert's case.

24. So if one be bound in a recognizance, and has two daughters, and dies, and they make partition, the one shall not be charged solely, but shall have contribution, and if the one is within age, the other shall take benefit thereof; because in such case, though she is charged as tenant, yet she shall have her age. 3 Rep. 13. a. by the reporter, in Herbert's case.

25. If a man is bound in a statute or recognizance, and after his death some of his land descends to the heir of the part of the father, and some to the heir of the part of the mother, one only shall not be charged, and if he is, he shall have contribution against the other. 3 Rep. 13. a. by the reporter, in Herbert's case.

26. A suit was for average of a ship robbed of certain goods, shipped at Bristol to Galicia in Spain. Dr. Dale, Master of the Requests, said, that by the civil law average is not due unless the goods are lost in such a manner, that thereby the residue in the ship is saved; as if goods of one of the merchants are cast into the sea
navis

Inavis evandi causa, then all the other merchants shall pay average, because thereby all the residue is saved; so if parcel is by *composition given to a pirate*, to save the residue; but not if a pirate takes parcel by violence; for in such case average shall not be paid for it. But in the principal case the merchants * having assented, after the ship was robbed, to pay average, it was decreed for the defendants. Mo. 297. pl. 442. Pasch. 32 Eliz. in the Court of Requests. Hicks v. Palington.

27. If a man grants a *rent-charge* out of all his lands, and afterwards *sells his lands by parcels to divers* persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in Chancery by a contribution from the rest of the purchasers, and the grantee shall be restrained by order to charge the same upon him only. Cary's Rep. 3.

28. Sir Edmund Morgan married the widow of Fortescue, he had his wife's lands distrained alone by the *grantee of a rent-charge* from her former husband, and therefore *sued the grantee* in Chancery, to *take a ratable part* of the rent, according to the lands he held subject to the distress, and notwithstanding the Ld. C. J. Popham's Report, who thought this reasonable, the Lord Chancellor Egerton would give him on this bill no relief, but *ordered that he should exhibit his bill against the rest of the tenants and grantee both*, the one to shew cause why they should not contribute, the other why he should not accept of the rent equally; otherwise it was no reason to take away the benefit of distress from the grantee, which the law gave him. Cary's Rep. 32, 33. cites 7 June 1603.

29. A collector of a *fifteenth* may levy all the tax *within one township*, upon the goods of one inhabitant only if he will, and that inhabitant shall have aid of the Court to make each other inhabitant contributory; per Tanfield Ch. B. which was granted by the Court, Bromley being absent. Lane, 65. Trin. 7 Jac. in the Exchequer. Anon.

30. If a *lighter, or a ship's boat, into which part of the cargo* aboard is *unladen for the lightening of the ship*, shall *perish*, and the *ship be preserved*, contribution is to be made; but if the *ship be cast away, and the lighter or boat preserved*, no average or contribution is recoverable; for *contribution may not be had in any case but where the ship arrives in safety*. Law of Trade and Commerce, 118, 119.

31. Where *passengers cast goods out of a ferry boat* in case of a tempest, which they may do for *preservation of their lives*, the owners shall have no remedy, unless the boatman surcharge the boat, when they may have their action against him. Law of Trade and Commerce, 119.

2 Bull. 280 i
S. P. Bird
v. Aftcock.
— Roll.
Rep. 79.
pl. 23. The
case of

Graveland barge, S. C. & S. P.

32. *Consuee of a statute comes to have part of the lands charged*, he cannot require contribution, though he grants over, and the lands of all other the *scoffees* are discharged, though such as are

or

or remain in the hands of the debtor himself are chargeable Hob. 45, 46. pl. 50. Fleetwood v. Aston.

33. *Heir* shall not have contribution but against the other heirs; per Jones J. 3 Bulst. 320. and per Doderidge J. 321. Hill. 1 Car. B. R. in case of Boyer v. Rivett.

34. How far the Court will restrain a lord to *distrein for rent* where he pleaseth, but for the present thinks fit that there should be a contribution. Toth. 103. cites Mich. 3 Car. Hall v. Offley.

35. If *after liberate a feoffment* is made of part to A. and part to B. the one shall not have contribution against the other; per Jones J. Lat. 274. Mich. 3 Car.

36. If a *purchaser* has cause of contribution, and makes feoffment, *his feoffee* shall not have it; per Jones J. Lat. 274. Mich. 3 Car.

[565] 37. In an English bill against the defendant, as *executrix* of her husband, to have contribution, the case was, that the plaintiff in this cause, and the testator, were *sheriffs of Middlesex*, and that there had been a recovery against them for an escape in the testator's lifetime, and 500 l. damages recovered, which the plaintiff in this cause had paid and satisfied, to which the defendant ought to contribute, as the bill suggests. The Court doubted hereof, the case being *primæ impressio*nis, and resembled it to the case of two joint obligors; but what became of it non constat. Hardr. 164. pl. 4. Hill. 1695. in Scacc. Philips v. Biggs.

38. 16 & 17 Car. 2. cap. 5. s. 2. *When any judgment, statute, or recognizance shall be extended, the same shall not be avoided or delayed by occasion, that any part of the lands extendible are omitted out of such extent, saving always to the parties, whose lands shall be extended, their remedy for contribution against such persons, whose lands shall be omitted.*

39. S. 3. *This act shall not give any extent or contribution against any heir within age, during minority of such heir, in respect of any lands descended.*

40. S. 4. *Provided that this act extend only to statutes for payment of monies, and to such extent as shall be within twenty years after the statute, recognizance, or judgment had.*

41. *This act shall continue for 3 years. Made perpetual by 22 & 23 Car. 2.*

And if devisee for life refuse to pay his share, the remainder, paying the whole, to

have the whole estate. Ibid. — Chan. Cases, 223, 224. S. C. But if tenant for life can prove that it was the intention of the deviser, that tenant for life should pay nothing, it was admitted to be material. — Fin. Rep. 221. Trin. 27 Car. 2. S. P. as to the one third to be paid by tenant for life, and two thirds by him in remainder, in case of Cornish v. New. — 3 Chan. Rep. 131. in case of Orby v. Mohun, S. P.

Or if E. should pay the whole,

43. A. charges land with payment of 50 l. a-piece to B. and C. at their respective ages of twenty-one, and limits the land over on default

default of payment, but if either die before twenty-one, her legacy to go to D. to whom A. devised the lands. D. devised the lands so charged to E. for life, remainder to F. in fee, and made E. executor. Decreed that F. should contribute two thirds towards payment of the legacies of 50 l. Fin. R. 304. Trin. 29 Car. 2. Peachy v. Colt.

his executors should hold the lands against F. till they should be satisfied. Ibid.

44. Land is mortgaged to A., then to B., then to C. If A. sues to redeem, and try his debt by decree, C. A. and B. shall be bound by the account which A. made in his suit, and pay, or contribute to the charges of suit, if made without fraud or collusion. 2 Chan. Cafes, 32. Trin. 32 Car. 2. Williams v. Day.

45. If the portion of any one lay on or out of Bl. Acre or other particular fund by itself, and the others out of Wh. Acre. or any other fund, each must bear his own loss; agreed at the bar. 2 Chan. Cafes, 132. Hill. 34 & 35 Car. 2. Tillsley v. Throgmorton.

46. Lands in mortgage were devised to A. for life, remainder to B. and his heirs. A. enters and takes an assignment of the mortgage in a trustee's name. A. died within one year. B. brought a bill against the executor of A. to redeem the mortgage, and his counsel insisted, that B. ought to pay only two thirds of what was due on the mortgage, and the other third to be allowed by A.'s executor, by reason that A. enjoyed the profits during his life. The Court said, that had B. come to redeem in A.'s life-time, then A. should have allowed a proportion of the money with respect to the value of their several estates; but A. being now dead, and having enjoyed the estate but one year only, the defendant must make an allowance only for the time that A. enjoyed the estate. Vern. 404. pl. 376. Trin. 1686. Clyat v. Battison.

47. A. on his marriage with B. agreed and gave a bond to settle particular lands on the wife, and the issue of the marriage, and afterwards aliens part of those lands; A. dies. Finch C. decreed the jointress to have the deficiency of her jointure made good out of the inheritance of the lands remaining unfold. But Jeffries C. reversed that decree, for the jointress and children are equally purchasers, and they must bear the loss in proportion. Vern. 440. in pl. 412. Hill. 1686. Carpenter v. Carpenter.

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S. P. per Cur. the widow to pay one third, and the reversioner in fee to pay two thirds.
Chan. Rep.

218. 221. 13 Car. 2. in case of Rowell v. Walley.

48. A. B. and C. were bound in a bond, A. being principal and B. and C. sureties; afterwards J. S. becomes bound to the obligee, that if the other three did not pay according to the condition of the bonds, that he would pay. A month after B., one of the two sureties, pays the money, and prefers his bill against the fourth now for contribution, and the question was, whether he should be bound to contribute, he being but a supplemental security? and the Master of the Rolls seemed to think that he should. 2 Freem. Rep. 97. pl. 107. Trin. 1686. Cooke's case.

49. A. covenanted to settle 100 l. a year annuity out of land on B. having no land at the time of the covenant, but afterwards purchases land in S. and D. and then devises S. to C. and dies, without settling

ting the annuity. D. descends to the heir of A. Decreed that D. and S. shall both be liable to the annuity, but that C. shall be reimbursed out of D. which descended to the heir. 2 Vern. 97. pl. 90. Pasch. 1689. Took v. Hastings.

50. A term was conveyed in trust to raise 500 l. a-piece for B. C. and D. to be paid at their respective ages of 21 years, remainder to G. for life, remainder to his first son in tail, remainder over. Decreed that G. pay 700 l. and those in the remainders 800 l. and so G. be let into possession, and whereas 500 l. only was now due, and the other not in several years, if the other 800 l. should become payable in the life of G. then G. shall pay it, but in such case the term for 99 years should stand his security to reimburse him again. Ch. Prec. 21. pl. 23. Hill. 1690. Rives v. Rives.

2 Vern. 267. 51. If an estate in mortgage be settled on A. for life, and then on pl. 253. B. in tail, or in fee; tenant for life shall bear two fifths of the Humphreys v. Hales, principal and interest, and the remainder-man three fifths. Chan. S. C. de- Prec. 44. pl. 43. Pasch. 1692. James v. Hales. creced accordingly, and whereas the tenant for life had cut down timber without having any power to commit waste, he was decreed to account for the timber, and that what he had raised thereby should be taken as so much in part of what the remainder-man was to pay towards discharging the incumbrance.

52. Upon an order for contribution to the relief of a poor parish, it was ruled, that the justice may either charge particular persons, or the whole parish, and they levy it, but here a sum in gross was laid for a whole year, which (it was objected) was unreasonable; for their ability might change; but the order was confirmed. Cumb. 309. Mich. 6 W. & M. in B. R. The King v. Knightley Parish in the Isle of Wight.

53. An estate in jointure was subject to a mortgage. Resolved that the jointress, and the reversioner, must redeem in proportion, viz. the jointress one third part, and the reversioner two thirds, and that hath been the proportion usual in this court, to charge the estate for life with a third; but it seems hard, because now an estate for life is worth nine or ten years purchase, whereas formerly it was worth but seven. 2 Freem. Rep. 210. pl. 284. Hill. 1696. Flud v. Flud.

[567] 54. And so it is if an estate subject to a mortgage is devised to A. for life, remainder to B. in fee, there they may redeem in proportion, viz. A. one third, and B. two thirds. Ibid.

55. Two several estates, one in the seisin of A. for life, and one of B. for life, are subjected to the raising of 2000 l. for a portion for a daughter, by a term of 500 years, to commence after the respective death of A. and B. A. died first, and that estate by limitation of the settlement came to R. The daughter brought a bill for the 2000 l. against R. who paid it. Afterwards B. died, and the fee-simple of that estate descended to the daughter. R. shall have contribution out of the estate of B. descended to the daughter, in proportion to its value; A.'s estate to be valued as an estate in possession, and B.'s estate as in reversion; per Somers C. assisted with

with Master of the Rolls. 2 Vern. R. 355. pl. 321. Hill. 1697. Henningham v. Henningham.

56. If a manor is held by the service of a bridge, every tenant of the manor is liable to the whole charge, and are contributory among themselves. 1 Salk. 358. pl. 5. Pasch. 3 Ann. B. R. The Queen v. Buckleugh (Duchefs of). 6 Mod. 150,
151. S. C.

57. Reversion expectant on an estate for life was conveyed to trustees to be sold for payment of specific debts, and if any surplus, to go to his heirs, executors, and administrators. A. married the heiress, and the husband got a conveyance from the trustees to him and his heirs, and paid some of the debts. The heir died without issue, and her heir brought a bill for a reconveyance, surmising that sufficient had been raised for payment of the debts out of the rents and profits. The husband insisted that his wife was as tenant in fee-simple, and what rents he received were in her right, and he has a right to retain them; but decreed that he ought to have paid the interest out of the profits, and shall not suffer the debt to increase, and that he account accordingly. 2 Vern. 566. Mich. 1706. Brompton v. Alkis.

58. Some persons fitted out a privateer in the French war, and by commission by letter of marque from the Duke of Savoy, sent her to cruize in the Mediterranean, where she took a French ship, in which were several Turks and Tripolins, and their effects, but the captain set the persons on shore, detaining some of their effects. The matter coming into the admiralty, the sentence was, that the ship and goods were not well taken by an Englishman, and English vessels, there being no commission from the king, but only from the Duke of Savoy, and therefore if the caption was lawful, yet it was a perquisite belonging to the Lord High Admiral; and also, because the Tripolins being in peace with England, their goods and effects were not to be seized by English ships or men. After this sentence, the captain having agreed the matter with the consul of Tripoli, and having obtained a grant of the ship and goods from K. William, brought his bill and obtained a decree for two thirds of the value of the ship and goods, each part-owner to pay according to the quantum of his interest, and if any were insolvent, the loss to be borne by such as were solvent, with interest and costs. 2 Vern. 592. Mich. 1707. Walton v. Hanbury.

59. A. seized in fee of the manors of B. and C. mortgages B. for 4000 l. and by will charges all his real estate with payment of his debts, and devises B. to J. S. and C. to W. R. and dies. J. S. to whom A. devised B. shall compel W. R. to whom A. devised C. to contribute to the payment of the mortgage on B. but in case the will should prove void, then there shall be no contribution. Wms.'s Rep. 505. pl. 146. Mich. 1718. Carter v. Barnardiston.

60. By marriage articles it was agreed, that 6000 l. in the hands of the trustees should be laid out in the purchase of lands, to be settled on the husband for life, remainder to the wife for life for her jointure, remainder to the first and every other son of that marriage in tail male successively, chargeable with 2000 l. for younger children, Gibb. 227.
S. C.

remainder *to the husband in fee*. The marriage took effect, and the 6000 l. being vested in lottery annuities in the year 1720, with the consent of the husband and wife, *was subscribed by the trustees into the S. S. Company, pursuant to the act of parliament*, which impowers and indemnifies trustees for so doing, upon which there happened a loss of near 3000 l.

Bill was brought by the only son of the marriage against the trustees, his father, and mother, and four infant sisters, for an execution of the trust.

One point was, how, and in what manner, and by whom, the loss in the trust money should be borne? Lord C. King was of opinion, that the loss upon the principal sum of 6000 l. ought to be borne in proportion, or average by all the children; *the loss happening under the direction of an act of parliament*, the trustees are not liable to make it good, and it is plain by the articles, that the parties intended, two thirds for the eldest son, and one third for the younger children, but if the eldest son should bear the whole loss, it would be just the reverse, the eldest son would have but one third, and the younger children two thirds. And decreed that *the eldest son bear two thirds of the loss, and the younger children one third*, according to their several proportions in the money; and referred it to the Master to have a settlement made accordingly. MS. Rep. Trin. 3 Geo. 2. Canc. Chambers v. Chambers.

3 Wms.'s Rep 404. in a note of the reporter, says, that in Trin. term following, this cause came on by appeal before

61. *Lease of a coal mine to A. reserving a rent; A. the lessee declares himself a trustee for five persons, to each a fifth. The five partners enter upon work, and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; the cestuy que trusts are not liable, but for the time during which they took the profits.* 3 Wms.'s Rep. 402. Mich. 1735. Clavering v. Westley & al'.

the Ld. Talbot, who decreed one R. the lessee (who made default) to pay the plaintiff the contribution monies he had received from each of the cestuy que trusts, towards working and carrying on the coal mine; and if that should prove not sufficient, the cestuy que trusts that were living, and the representatives of such as were dead, and who were all before the Court, to contribute each one fifth towards satisfying the plaintiff the arrears of rent that had incurred during the time they had concerned themselves in taking the profits. The plaintiff to have back the 10 l. deposit.

For more of Contribution and Average in general, see *Charge, Debile, Mortgage, Payment, Rent, Surety, Trade and Navigation, Trespass*, and other proper titles.

Conufance of Pleas.

Fol. 489.

(A) Franchise.

At what Time to be demanded.

[1. **I**F a franchise be granted to a vill, that assises of land within the vill shall not be taken out of the vill; if an assise be brought out of the vill, and the assise is awarded for default of the tenant,* the bailiff of the vill shall not have the franchise if he demands it after. 20 Aff. 13.]

awarded, and the court seised before the demand.——In assise, the bailiff of S. demanded conufance, and could not have it, because the assise did not appear, and there conufance was not granted; but quære de rigore juris. Br. Assise, pl. 33. cites 12 Aff. 6.

* [569]

2. Where the court is suffered to be seised, as by award of process, or by award of assise, or such like, the lord of the franchise shall not have conufance of the plea by reason of his laches. Br. Laches, pl. 1. cites 3 H. 6. 10.

3. If bailiffs, who have conufance of pleas, suffer assise to pass without demanding the conufance, yet they may have the conufance in another assise. Br. Laches, pl. 2. cites 3 H. 6. 14.

4. And where sheriff returns mandavi ballivo libertatis, &c. qui habet return' brevium & executiones eorundem qui non mihi dedit responsum, by which non omittas issues, yet in another action the bailiff shall have return and service of the writ, notwithstanding his laches in the other. Br. Laches, pl. 2. cites 3 H. 6. 14.

5. The ld. was ousted of his conufance because it was not demanded till after imparlance; resolved; and though some have seemed to make a difference between plea pleaded to the jurisdiction by the defendant, and by a stranger, as in the principal case, yet it seems there is no difference, and that the lord cannot plead it after imparlance. Sid. 103. pl. 9. Hill. 14 & 15 Car. 2. B. R. The Bishop of Ely's case.

6 H. 7. 6. Mich. 9 H. 7. 6. Trin. 6 H. 7. 17. that though the party cannot plead to the jurisdiction after imparlance, because he has by his imparlance admitted it, yet the bishop who is a stranger may demand it at any time; Windham J. inclined to be of that opinion; sed adjournatur.——A claim made after imparlance is too late; per tot. Cur. 10 Mod. 120. Hill. 11 Ann. B. R. Cambridge (University's) case.——No claim can be made by the university after imparlance; per Holt Ch. J. Show. 352. Trin. 4 W. & M. in case of Parker v. Edwards & al'.——S. P. per Cur. Barnard. Rep. in B. R. 66. Trin. 2 Geo. 2.——But in such case privilege was allowed; per Cur. Godb. 404. pl. 485. Pasch. 3 Car. B. R. Fryer v. Dew.

Br. Conufance, pl. 35. cites S. C. accordingly, by reason that the assise was

2 Inst. 130. ad finem, S. P. and cites S. C.

2 Inst. 130. ad finem, S. P. and cites S. C.

Lev. 89. S. C. and Twisden J. he'd accordingly; but upon citing 40 E. 1. 2. 11 H. 4. 47. b. 43. b. Mich.

(A. 2) The several Sorts of Conusance of Pleas, and the Differences.

12 Mod. 643. S. C. — 2 Lord Raym. Rep. 836. S. C. and same divisions, by Holt Ch. J. — 10 Mod. 126, 127. Hill. 21 Ann. B. R. 17g in the case of the University of Cambridge, divides the courts in like manner, and cites Hardr. [505, &c. pl. 4. Pasch. 21 Car. in the Exchequer,] and says, the difference between *cognitio placitorum* without exclusive words, and when with, is not, that the last has an exclusive jurisdiction, and the former not; for *cognitio placitorum* does, ex vi termini, exclude all other courts, and imports the words, et non alibi; but the first difference is, that the former must be local, confined to some place; the latter may follow the person, and be as good place universal. 2dly, In the former, if the lord waive his privilege, there shall be re-summors, and proceedings shall begin where they left off; but in the latter, in case of waiver, or the like, the proceedings in the court excluded by this jurisdiction must begin de novo. 3dly, The former is for the advantage of the lord only, and therefore the lord only can claim it, and not the party; but where there are exclusive words, the party may claim it as well as the lord. Says that in 9 H. 7. fol. 10, 11, 12. these differences are fully and clearly laid down.

* [570]

2. Conusance of pleas is that one living within the jurisdiction, may implead another within it for a cause arising there; per Holt Ch. J. 12 Mod. 643. Hill. 13 W. 3. in case of Crofs v. Smith.

(B) Of what Actions Conusance may be granted.

† Br. Co. 1. THE grant of conusance in a *quare impedit* is void, for the franchise cannot do right therein, scilicet, *send a writ to the bishop*. † 44 E. 3. 29. b. 38. 14 H. 4. 20. b. 50. Ass. 9. per Kin. † 26 Ed. 3. 73. b.]

† Fitzh. Conusance, pl. 86. cites S. C. & S. P. by Thirn. — Br. Conusance, pl. 8. cites 40 E. 3. 2. S. P. — Dal. 12. pl. 20. Pasch. 7 E. 6. Anon. S. P. — Fitzh. Conusance, pl. 41. cites Pasch. 15 E. 3. S. P. per Poole. — Co. Litt. 134. b. in principio, S. P. — 4 Le. 237. pl. 377. Mich. 5 Jac. S. P. — Jenk. 34. pl. 66. S. P. — Gilb. Hist. of C. B. 156. S. P.

In a recordare, the bailiff of franchifedemanced the conusance; Belknap

[2. At common law conusance might be granted in a *recordari* or *replevin*. 38 Ed. 3. 31.]

[3. But otherwise it is now after the statute, which provides, that if the plaintiff be nonsuit, a second deliverance shall be granted, and the franchise hath not power to grant it, therefore there would be

be a *failure of right* if he fhould have conufance. 38 Ed. 3. 31. *Quære.*]

faid, they could not have conufance, becaufe fecond deliverance is given by the ftatute, which they cannot make upon nonfuit of the plaintiff, fo that they cannot do right as the king's court can. But Knivet faid, that where they might have conufance before the ftatute, they fhall have it now; for the ftatute does not ouft it. But per Thorp, they fhall not have it, becaufe they cannot make the fame procefs which is given by the ftatute; but Brooke fays *quære*; for it feems, that where they had conufance of the original before, the ftatute extends to them to make new procefs. Br. Conufance, pl. 23. cites S. C. — The original writ of *rep'eg'* is in nature of a jufticies, and is not returnable, and in a jufticies no conufance can be demanded, becaufe none can demand conufance, but he that hath a court of record, and of a plea in a court of record; but the county court, though the plea be holden therein by jufticies, the king's writ, yet it is no court of record, for of a judgment therein there lieth a writ of falfe judgment, and not a writ of error; alfo, if the fheriff fhould grant the conufance, he could not award a re-fummons, and the lord of the franchise can demand no conufance in a replevin. 2 Inft. 140.

Conufance fhall not be granted in replevin, becaufe if the plaintiff be nonfuit, a fecond deliverance fhall be granted, which the franchise cannot do. Gilb. Hift. of C. B. 156.

[4. It feems that conufance may be granted to *levy fines* in a franchise; admitted 44 Ed. 3. 29. 38. if the grant had been *expreffly*.]

pl. 21. cites 44 E. 3. 37. S. P. in both which it feems that they cannot have conufance of levying fines, without exprefs words in the grant. — Fitzh. Conufance, pl. 30. cites 44 E. 3. S. C. and fays, that it ought to be fpecially mentioned in the charter, if the franchise would take any advantage of it — Br. Fines, pl. 22. cites S. C. — See (E) pl. 2. S. C. — A fine cannot be levied to have the force of a final concord by any that hath power tenere placita, but only before the juftices of the court of C. B. or before juftices in eyre (whilft they flood) and not elfewhere, faith this act, and therefore the king cannot grant power to hold plea for the levying of fines againft this negative ftatute. 2 Inft. 515.

Br. Conufance, pl. 29. cites 44 E. 3. 28. S. C. and

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[5. Conufance cannot be granted to a lord in *ancient demeafn* of *writs of waffe and re-diffeifin*, for there wants fuch judge as ought to be in fuch actions, fcilicet, the fheriff. 1 H. 4. 5.]

caufe no court can award action of waffe but the king's court; per Cur. Dal. 12. pl. 20. Pafch. 7 E. 6. cites Trin. 4 E. 3. Fitzh. Conufance, 69. — Gilb. Hift. of C. B. 156. S. P. In *rediffeifin* conufance fhall not be granted, becaufe the defendant cannot be awarded to prifon there. Dal. 12. pl. 20. Pafch. 7 E. 6. — 4 Le. 237. in pl. 377. Mich. 5 Jac. S. P. faid.

Conufance fhall not be granted in action of waffe, be-

6. In *writ of right after battail joined*, a man fhall not have conufance; becaufe he cannot try the iffue by battail; per Kirtton. Br. Conufance, pl. 12. cites 44 E. 3. 28.

7. In *admeafurement of paffure* conufance fhall not be granted, becaufe no writ de fecunda fuperoneratione can be granted there. Dal. 12. pl. 20. Per Cur. Pafch. 7 E. 6.

Gilb. Hift. of C. B. 156. S. P.

8. In *attaint upon a verdict* in Norwich, upon the ftat. 23 H. 8. againft a citizen there, the corporation demanded conufance by charter of E. 4. de omnibus placitis & attinctis, and the charter was confirmed by E. 6. but the conufance was denied; for the words of the ftatute are, that all attaints fhall be taken in B. R. or C. B. and in no other court. D. 202. b. pl. 70. Trin. 3 Eliz. Clovil's cafe.

Bendl. 98, 99. pl. 144. S. C. accordingly; for the charter of E. 4. was confirmed by general words only

in 3 E. 6. and there are no words of non obftante aliquo ftatuto, &c. and in the ftatute of 23 H. 8. there is no provifo for Norwich; and this ftatute expired 7 E. 6. and was revived again, and a new one made 7 E. 6. and fo this ftatute was made after their confirmation. — Bendl. in Keilw. 2109 b. pl. 16. S. C.

9. Lord Anderfon, Ch. J. of C. B. brought *trespafs* by bill for breaking his houfe, in the city of *Worcefter*, againft A. a citizen there.

Conufance of Pleas.

there. The corporation produced a charter granted them by E. 6. and demanded conufance of pleas; per tot. Cur. it shall not be granted; because the privilege of C. B. whereof the plaintiff is a principal member, is more ancient than the patent whereupon the conufance is demanded; for the justices, clerks, and attornies, ought to be here attending their offices belonging to them, and shall not be impleaded or compelled to implead others elfewhere than in this court; and this privilege was given to C. B. upon the original erection thereof; per tot. Cur. and the conufance was denied. 3 Le. 149. pl. 198. Mich. 29 Eliz. C. B. The Lord Anderson's cafe.

10. If the king grants conufance of pleas, grantee shall not have cognizance of *affife, rediffeyn, &c.* fic dictum fuit. 4 Le. 237. pl. 377. Mich. 5 Jac.

But Bendl.

233, 234.
pl. 262.

Mich.
16 Eliz.

Whoper,
alias Hooper,
v. Hare-
wood, an
attorney of
C. B. in
action of battery,

11. K. H. 8. by letters patent of the 14th of his reign, and confirmed by parliament, granted to the univerfity of Oxford conufance of pleas, in which a fcholar or fervant of a college fhould be party, *ita quod iuficiarii de utroque Banco fe non intromittant.* An attorney of C. B. fued a fcholar in C. B. for battery; per Cur. this general grant does not extend to take away the fpecial privilege of any court without fpecial words. Litt. Rep. 304. Mich. 5 Car. C. B. Oxford (Univerfity's) cafe.

action of battery, the conufance was granted to the bifhop of Bath and Wells.

12. If a fcholar of Oxford, or Cambridge, be fued in Chancery for a fpecial performance of a contract to leafe lands in Middlefex, the univerfity fhall not have conufance, becaufe they cannot fequefter the lands. Gilb. Hift. of C. B. 157. cites 2 Vent. 363. [Hill, 35 & 36 Car. 2. in Canc. Draper v. Crowther.]

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(C) *Against what Perfons* it fhall be granted.

See S. C. at
tit. Privi-
lege (F)
pl. 3.

[1.] If a clerk of the King's Bench be fued by bill in Banco Regis, for land in a place where another hath conufance of pleas, yet the conufance fhall not be granted, for otherwife the officers of this court fhould be drawn to attend in inferior courts. Trin. 4 Jac. B. R. Butt's cafe, per Popham.]

But in that
cafe, which
was battery
againft two,
one of whom
was a fo-
reigner, but

not the other, and therefore becaufe the plaintiff might in this cafe of battery (though otherwife in confpiracy) have brought the action againft the other, and omitted the foreigner, who was made a party out of fubdety to cuf the franchise of its conufance; Thorp granted the conufance. 22 Aff. 83.

The defend-
ant being in
cuftodia mar-
in B. R. or
the plain-
tiff's com-

3. Bill of debt againft accountant in the Exchequer, and counted againft him, and the defendant made no defence, nor other thing, but prayed the Court to have day in the fame term, which was granted and entered, and before this day came the abbot of Battel, and demanded

manded conufance of the plea; and per Hutton, *upon privilege of Exchequer, or bill of Middlefex in custodia marifchalli*, conufance of plea fhall not be granted; for this privilege, nor custody, cannot be in another court; but the Court was againft this clearly, and that the conufance may be granted upon bill, but becaufe *day was taken, and entered to answer*, though no defence was made, therefore the conufance was oufted; per Cur.. Br. Conufance, pl. 50. cites 6 H. 7. 9.

for they are now grown the common way of fuing in thofe courts. Gilb. Hift. of C. B. 157. — Gilb. New Abr. 562. S. P. in totidem verbis.

mencing a
fuit in the
Exchequer
a quo minus,
as debtor to
the king,
are not fuch
privileges as
will oust an
inferior ju-
rifdiction,

4. The king grants to the mayor, bailiffs, and jurats of the *cinque ports*, that they fhall *not be impleaded* for land, or for any other caufe arifing there, *elfewhere than before the conftable of Dover at Shepway*; this grant does *not bind the king* in a cafe where he is party; it does not bind the king as to his own cafe in a quo warranto, nor in a quare impedit. By all the judges of England. Jenk. 190. pl. 93. cites 22 H. 7.

Kelw. 88.
b. 89. a.
90. a. b.
S. C.

(D) Of *what Actions* Conufance fhall be faid to be [573] granted *upon a general Grant*.

[1. IF the king grants to a corporation to hold plea of all actions, yet they fhall *not* have conufance of any plea out of another court, without fpecial grant of conufance. 9 H. 6. 27. b.]

Br. Patents,
pl. 4. cites
S. C. & S. P.
nor by the
word placi-

tum can a man have affife; for this is querela; per Vampage.

[2. But if the grant be, that they fhall have conufance of all actions, &c. they fhall have conufance out of other courts. 9 H. 6. 27. b.]

[3. If the king grants conufance of all manner of pleas, yet the grantee fhall *not* have conufance of appeals of felony. 8 H. 6. 21.]

Br. Conu-
fance, pl. 27.
cites 8 H. 6.
18. S. C. & S. P. by Strange.

[4. Nor of appeals of mayhem. 8 H. 6. 21.]

Br. Conu-
fance, pl. 27.

cites 8 H. 6. 18. S. C. & S. P. by Strange, unlefs it be expreffed in the charter.

[5. If conufance be granted of all pleas *motis in quibuscunque curiis*, &c. they fhall have conufance of *pleas motis in Banco*, or *Banco Regis*, without naming them fpecially. 9 H. 6. 27. b.]

Fol. 490.

Br. Patents,
pl. 4. cites S. C. — If the king grants conufance of pleas in quibuscunque curiis fuis, the grantee fhall not have conufance extra Bancum Regis, without fpecial mention thereof, becaufe it is coram rege; per Babington. Br. Conufance, pl. 27. cites 8 H. 6. 18.

[6. If the king grants conufance of all manner of pleas *motis coram quibuscunque iudiciariis*, yet he fhall not by this have conufance of pleas moved in *Banco Regis*, without fpecial naming it. * 8 H. 6. 21. Contra † 9 H. 6. 27. b.]

* See fupra,
pl. 5.
† Br. Pa-
tents, pl. 4.
cites S. C.
but S. P.

does not clearly appear.

[7. If

* Br. Conufance, pl. 61. cites S. C.

[7. If conufance be by *prefcription to hold plea by writ of right patent, in nature of any action*, they cannot hold plea of a writ of for when the *covenant*, for they cannot have a *real writ in nature of a perfonal writ*. 44 E. 3. 37. * 50 Aff. 9.]

as writ of right is, this cannot be turned into covenant afterwards, and fo change it into a plea perfonal, and thereby levy a fine by writ of right, making proteftation; per Knivet. But Brooke fays, quere if it had been fo ufed; for then it feems good.—And the charter willed, that they fhall not be impleaded of tenements in D. nor in the fuburbs of the fame, nor of covenant, contract, nor trefpafs there, but only before the mayor and bailiffs of Oxon, *nifi tanga' nos vel haered' nostros, & quod habent executionem in omnium placitorum, & quod in omnibus actionibus placitare poffint per breve de recto per proteftationem in natura cujusunque brevis*; and yet, per Knivet, it is a queftion, whether they may levy fines, becaufe it is not exprefly granted; and fo it feems, that by general grant of the king fuch things do not pafs. Ibid.—Br. Fines, pl. 22. cites 44 E. 3. 37. Br. Fines levied, &c. pl. 104. cites S. C. & S. P. per Knivet; for the action is real, and the proteftation is perfonal; and therefore, if it be not exprefly to levy a fine, it is a great queftion.

2 Infl. 575. S. P. and that the king cannot

[8. If conufance be granted of *all pleas*, yet a *fine* cannot be levied there, for this is *no plea*, but a record. 3 H. 4. 6. dubitatur.]

grant power

to hold plea for the levying of fines againft the negative ftatute of *modus levandi fines*. 18 E. 1.—See the notes to pl. 7. fupra.

[57.]

† Br. Conufance, pl. 20. cites S. C. & S. P. by Norton.—Fitzh. Conufance, pl. 21. cites S. C.

[9. [So] If conufance of *pleas* be granted, and *no mention of affifes*, he fhall not have conufance of affifes. † 12 H. 4. 12. b. † 26 Aff. 24. adjudged, becaufe it is not placitum, fed querela. 9 H. 6. 27. b. § 14 H. 6. 12. 38 Aff. 25. ¶ 30 Aff. 31. ¶ 34 Aff. 14. ** 26 Aff. 24. adjudged. †† 22 Aff. 49. per Thorp.]

† Br. Conufance, pl. 40. cites S. C.—Fitzh. Conufance, pl. 57. cites S. C. accordingly; for affife is not a common plea.

§ Br. Patents, pl. 27. cites S. C. that where the king granted cognitionem placitorum before time of memory, the patentee fhould have conufance of affife, but not by fuch words after time of memory.

¶ Br. Conufans, pl. 46. cites S. C. & S. P.—Fitzh. Conufans, pl. 62. cites S. C.—Br. Patents, pl. 105. cites S. C.

¶ Br. Conufans, pl. 48. cites S. C.—Jenk. 31. pl. 61. cites S. C.—Ibid. 33. pl. 66. cites S. C.

** Br. Conufans, pl. 40. cites S. C.—Fitzh. Conufans, pl. 27. cites S. C.—S. P. 4 Le. 237. pl. 377. Mich. 5 Jac.—S. P. nor fhall fuch patentee hold plea of certification of affife.—Br. Patents, pl. 100. cites 37 H. 8.

†† Br. Patents, pl. 32. cites S. C. & S. P.

See the references to the books here cited, in the notes to the plea

[10. But upon an *ancient grant* by fuch words, (*if conufance had been allowed in an affife* after memory, as it feems the book is to be intended,) he fhall have conufance of affifes. 12 H. 4. 13. 14 H. 6. 12. 30 Aff. 31. admitted. 34 Aff. 14. adjudged.]

next before.—*Affife againft the abbot of Glaffenbury*, in the county of Somerfet, the abbot enfured by attorney, and claimed franchife, and fhewed the charter, by which William the Conqueror had granted to his predecessors *omnem regiam pteftatem & cognitionem omnium placitorum*, &c. that the charter had been allowed in affife before Stouff; per Finche, the charter is *before time of memory*, and has not been in ufe; and by fuch words it is not fufficient at this day, and alfo the abbot himfelf is party. Thorp J. conceffit in cafe of a new charter, but becaufe it had been allowed, and was an ancient charter, therefore the conufance was granted, though the abbot was party; the reafon feems to be, becaufe it may be told before the fteward of the abbot, who may be as indifferent between the abbot and the party, as the king's juftices are between the king and his fubjects, in action between them. Br. Conufance, pl. 48. cites 34 Aff. 14.

Br. Patents, pl. 105. cites S. C.

[11. So if upon an ancient grant to an abbot, &c. *quod habeat Curiam fuam regalem*, &c. If conufance hath been allowed in affife,

affiſes, he ſhall have conuſance of *affiſes*. 30 Aff. 31. adjudged.] ſays, that ſeveral allowances in

affiſe, and ſuch grants there, were ſhewn, and ſo the conuſance was allowed; but Brooke ſays, *quare legem* by ſuch general grant at this day. — Br. Conuſance, pl. 46. cites S. C. and Thorpe ſaid, that the words *curia regalis* are better than thoſe of *cognitio omnium placitorum*. — Fitzh. Conuſance, pl. 62. cites S. C. & S. P. by Thorpe.

[12. But upon an *ancient grant*, if conuſance hath *not been allowed in an affiſe*, though there hath been a general allowance of liberties, he ſhall not have conuſance of *affiſes*. Contra 37 Aff. 6. adjudged.] Br. Conuſance, pl. 49. cites S. C. where in *affiſe* the bailiff of

Beverley demanded conuſance, and ſhewed exemplification of their charter confirmed by this king, which wills that the king *conceſſit prepoſito prepoſitura ville de Beverley curiam ſuam*, and ſhewed at another time *allowance* in hæc verba, ballivi villæ Beverley habeant libert' ſuam, and the Court was in doubt to allow conuſance, becauſe the bailiffs were not thoſe to whom the liberties were granted, but the provost; and after, by advice of the other juſtices upon adjournment, becauſe their court ſhall be intended to be held by their own ſteward or bailiff, conuſance was granted. — Fitzh. Conuſance, pl. 64. cites S. C. accordingly. — Allowance ought to be pleaded to have been made before juſtices in eyre. Sid. 103. pl. 9. Hil. 14 & 15 Car. 2. B. R.

[13. If conuſance of *all pleas* be granted, they ſhall not have conuſance of ſuch *actions* which were *not in eſſe at the time*, but created after by ſtatute. 14 H. 4. 2. * [20]. * Br. Conuſance, pl. 21. cites S. C. — Fitzh. Conuſance,

pl. 22. cites S. C. — Br. Conuſance, pl. 56. cites 22 E. 4. 23. S. P. — S. C. cited D. 85. a. pl. 88. Paſch. 7 E. 6. in the Serjeant's caſe. — Gilb. Hiſt. of C. B. 157. cites S. C.

[14. As they ſhall not have conuſance of a *writ of maintenance*, which was by a ſtatute after the grant made of all *actions*. 14 H. 4. 20.] Br. Conuſance, pl. 21. cites S. C. — Fitzh. Conuſance,

pl. 22. cites S. C. — Br. Conuſance, pl. 56. cites 22 E. 4. 23. S. P. — S. C. cited D. 85. a. pl. 88. Paſch. 7 E. 6. in the Serjeant's caſe.

[15. The ſame law is of a *decies tantum*. 14 H. 4. 20. b.] Br. Conuſance, pl. 21. cites S. C. — Fitzh. Conuſance, pl. 22. cites S. C. — Br. Conuſance, pl. 56. cites 22 E. 4. 23. S. P.

[16. The ſame law is of a *conſpiracy*. 14 H. 4. 20. b.] Br. Conuſance, pl. 21. cites S. C. — Fitzh. Conuſance, pl. 22. cites S. C.

[17. But where the *action was at common law*, and is given againſt a perſon by another name than was before the grant of conuſance, as an *action of debt againſt an adminiſtrator*, there they ſhall have conuſance. † 14 M. 4. 20. b. † 22 E. 4. 23.] † Br. Conuſance, pl. 21. cites S. C. — Fitzh. Conuſance,

S. C. — S. C. cited D. 85. a. Paſch. 7 E. 6. in the Serjeant's caſe. † Br. Conuſance, pl. 36. cites S. C. — S. C. cited by Hobart Ch. J. Hob. 48. — Gilb. Hiſt. of C. B. 157. S. P. and cites the ſame caſes.

18. Where conuſance is granted to a man *pro ſe & hominibus ſuis* by charter of the king out of the one bank and the other, except in *pleas of the crown*, that they have a conuſance *sicut habuerunt ante adventum Banci*, and it was ſaid for the king, that *affiſe* is no plea of the one bank, nor of the other, unleſs for the county in which the bank ſits; for it was demanded in *affiſe* here, and that by this word (*hominibus*) it ſhall extend only to the villeins; per Shard,

Br. G ante, pl. 75. cites S. C.

Conufance of Pleas.

Shard, it extends to those who become their men in doing homage, quere of those who do fealty, but Parning was mere contra, and it was said, in protection pro se & hominibus, villeins, nor franktenants shall not be aided, therefore it seems there that it extends only to his *family servants*. Br. Conufance, pl. 34. cites 12 Aff. 35.

19. Conufance of pleas was granted to an abbot in the time of the kings St. Edmond and St. Edward, *exclusive of the justices of the common pleas, of the King's Bench, and of the justices of assise*; this grant does not extend to assises, *without exprefs words of assises*, although it was confirmed by H. 8. Resolved by the counsel, that the king's charter ought to have a reasonable construction. Jenk. 33. pl. 66. The Abbot St. Edmond's Bury's case.

20. *Tenor of a record of a fine was removed into Bank by certiorari and mittimus out of the court of the abbot of Reading, and the abbot demanded conufance of the plea, becaufe King H. 2. had granted to the abbot the hundred of R. and that the tenants of the abbot should not be impleaded out of the hundred de quibuscunque placitis, contractis, &c. and that they may hold plea of assise before his justices, and to levy fines, & omnem libertatem, unless where the abbot himself was party, and that the king had confirmed it with a clause licet abusi fuerint, and that they have used at all times after to levy fines*; by the best opinion he shall not have conufance, as it seems. Br. Conufance, pl. 12. cites 44 E. 3. 28.

21. In *ejectment* in B. R. &c. the mayor and commonalty of S. demand conufance of pleas by virtue of a grant of Q. Eliz. shewn to the Court *tenere placita, &c.* Exception was taken, that the defendants did not show any allowance in eyre, or in quo warranto, or upon any record, or that at least he ought to have a special writ to the Court to allow the charter; besides, the grant *tenere placita* does not take the jurisdiction from other courts without negative words. It was admitted, that if the demand had been by virtue of an old grant time out of mind, then there must be an allowance in eyre, &c. but this was upon a new grant in the reign of the queen, and shewn in court, and that this is good cites 39 E. 3. 15. which is exprefs in point; and it is true, that *tenere placita* does not take away the jurisdiction of others in exprefs words, but grant of *conufance of pleas ex vi termini*, implies that no other court shall hold plea of such matters, and cites 9 H. 7. It was adjourned. Palm. 456. Trin. 3 Car. B. R. Hampton v. Philips.

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(E) *Of what Actions, Suits, and Pleas, Conufance shall be said to be granted; as Consequents, and incident to the Thing granted.*

Br. Conufance, pl. 12. cites S. C.

[1. **WHEN** conufance is granted, though *no process is limited*, as that he shall have a *petit cape*, or *process upon voucher*,

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or other procefs, touching the pleas, yet he fhall have them as & S. P. by incident. 44 E. 3. 29.] Wyche.

conceffit.——Where conufance of pleas is granted, it belongs to it to make procefs by copias, con-
tingit, or fi per magnam diftrict' non venerit, exitus fues amittat coram ballivo libertat' ficut coram
juftic' & fi pars convincatur, capiatur & imprifonetur, & redimatur domino loci, becaufe all fuch proceffes
belong to conufance of pleas, and without them conufance cannot be made. Br. Conufance, pl. 38.
cites 22 Aff. 61. per Thorpe, Baſſet, and Bank, J.——Br. Execution, pl. 121. cites S. C.——
See (N) pl. 4, 5, &c. and the notes there.

[2. If conufance be granted of writs of covenant, a fine may be
levied there upon it; for this is but a conſequent. * 44 E. 3. 29. Quære, whether this general grant fhall extend to fo high a
conveyance of land; this alfo will be prejudicial to the king
by the lofs of his fines for alienation, * and Brook, Conu-
fance, 12. ſeems the better opinion, that this fhall not extend
to fines. 3 H. 4. 6.]

he cannot levy a fine, but can only hold pleas of covenant which are only in damages.——Fitzh. Co-
nuſans, pl. 20. cites 44 E. 3. S. C. & S. P. accordingly.——Br. Patents, pl. 107. cites S. C. &
S. P. accordingly.——See (B) pl. 4. and the notes there.

3. By grant of conufance of original, a man fhall not have
conufance of reſummons. Br. Conufance, pl. 40. cites 26 Aff. 24.

4. Note, per tot. Cur. if the king grants to J. S. cognitionem om-
nium placitorum tenendi before his bailiff, licet J. S. fuit pars, it is
good; contra if it was to hold before the ſame J. S. and fo fee that
it ought to be † expreſſed before whom the plea fhall be held
Br. Conufance, pl. 55. cites 21 E. 4. 47.

* Br. Conu-
fance, pl. 12.
cites 44 E. 3.
28. S. C.
but there it
is ſaid by
Thorpe,
that by the
words plea
of covenant,

† S. P. Br.
Attach-
ment, pl. 62.
cites 2 H. 7.
13.

(F) How it ought to be granted. [And when it muſt [577]
be ſaid before whom it ſhall be, as] Judge.

[1. THE grant ought to make mention before what judge the pleas
ought to be held, otherwiſe the grantee fhall not have
conufance by force of it. † 44 E. 3. 17. b. 18. 1 H. 4. 5.
6 H. 4. Placito, 3. Contra, 8 H. 6. 21. b.]

Br. Conu-
fance, pl. 11.
cites S. C.
& S. P. by
Thorpe.——
Fitzh. Co-
nuſans, pl. 27. cites S. C.——But if grantee had a court there before, he may make a ſteward; contra
of him who had no court. Br. Conufance, in pl. 11. cites 2 H. 7. per Kible. And Thorpe ſaid,
that if ſuch grant had been allowed in eyre, it is material, but allowance in Bank oftentimes is not to
the purpoſe. But Brooke ſays quære, becauſe he ſays it is not adjudged.——S. P. Br. Patents,
pl. 83. cites 2 H. 7. 13 per Kible.——S. P. Br. Conufance, pl. 62. cites 2 H. 7. 13. But
Brooke ſays, quære inde, if he does not ſay in curia mea.——S. P. Br. Patents, pl. 100. cites
37 H. 8. and that it ought to ſhow where, as at Guildhall, or the like.——S. C. cited Arg.
2 Roll. 155.

[2. William the conqueror granted to an abbot omnem regiam
poſteſtatem & omnem juſtitiam puniendi & dimittendi, and this had
been anciently allowed to be held before his bailiff, this fhall not now
be diſallowed. 12 H. 4. 13.]

[3. But if a grant be made without ſuch allowance, and it is not
determined before whom the plea fhall be held, it fhall not be held
before his bailiff. 12 H. 4. 13.]

Br. Conu-
fance, pl. 20.
cites 12 H.
4. 12. S. C.

Br. Conu-
fance, pl. 20.
cites S. C.

[4. But

Fitzh. Conufans, pl. 28. cites S. C. — Br. Conufans, pl. 11. cites S. C.

[4. But if it appears by implication what judge is intended, it is good; as if the grant be, *that the grantee ſhall have conufance in his court*; this implies, that it ſhall be before the judges and miniſters of the grantee, and therefore it is good. 44 E. 3. 17. b.]

and if the juſtices of the king enter, they are not his juſtices; and ſays, that it was ſo held the ſame day, in the abbot of Reading's caſe.

[5. But a grant of conufance of pleas to another within the precinct of his manor, is not good without more. 6 H. 4. placito 3.]

Such grant is good, though the grantee has no ſeward;

[6. But if in ſuch caſe it be further to be held before his ſeward, it is good. 6 H. 4. placito 3.]

for he may make a ſeward. Br. Conufans, in pl. 11. cites 7 H. 4.

Br. Conufans, pl. 58. cites S. C. that the grant is good; for

[7. If the king grants conufance of pleas to another to be held before his bailiffs, ſtewards, or juſtices, if he had not ſuch officers before the grant, he cannot make them by this; ſo the grant is void. 7 H. 4. 5. b.]

he may appoint the ſeward or juſtice; quod nota; and that hence it follows, that if conufance of pleas be granted, and it is not ſaid before whom, it ſhall be held the grant is not good.

In this caſe the Court was in doubt whether by the word curia, it

[8. If the king hath anciently granted to another *curiam ſuam of a town, without appointing who ſhall be judge*, yet if conufance hath been thereupon allowed to the bailiff of the grantee, it ſhall be good. 37 Aff. 6. adjudged.]

ſhould be intended that the juſtice of the king ſhould hold it, or the ſeward of the grantee. And after, by advice of other juſtices, upon adjournment, conufance was granted, becauſe their court ſhould be intended to be held before their own ſeward or bailiff. Br. Conufance, pl. 49. cites S. C. — Fitzh. Conufans, pl. 64. cites S. C. accordingly.

[578] 9. Affiſe in the county of Southampton of tenements in S. where the bailiffs of S. came, and ſhewed charter, by which King H. had granted to the burgeſſes of S. *that they ſhall not be impleaded out of their vill of tenements within their vill, and that affiſe ſhall be taken within the vill*, and that at all times after the charter, the juſtices had uſed to come and take the affiſe in the vill; and note, that *non dicitur coram quo placita illa teneantur in the vill of S. nor does the charter will that the juſtices ſhall come within the vill, nor was conufance of pleas granted by the charter to the bailiffs*. Fitzherbert ſaid, that this exception is for the party; and not for the bailiffs, for the cauſe aforeſaid, and the party is paſt it, for he had taken continuance before, and for theſe reaſons the Court was in opinion, that they ſhould not have theſe franchiſes. Br. Conufance, pl. 45. cites 30 Aff. 1.

10. And after they demanded the affiſe, and the jury came, and ſome of them ſaid, that they were burgeſſes of S. and that by the ſame charter it was granted *that the burgeſſes ſhould not be put in affiſe, nor in juries, but within their vill*, and prayed thereof allowance, to which it was not answered. But Brook ſays, it ſeems clearly that they ſhall have thereof allowance upon ſhewing the charter. Ibid.

(G) *How it may be granted.*

[1] IF the king grants conufance, he fhall not change the day by his grant, for he cannot change the common day in a plea of land, for there is a ftatute called *dies communes*, &c. and this ftatute limits the day in a plea of land, and therefore the king cannot grant a fhorter day, for this would be againft the ftatute. 8 H. 6. 21.]

[2. The king cannot grant conufance of pleas to another, to have the original out of any court, &c. for if he fhould have the original, there could be no refummons, and fo there would by a failure of juftice. 26 Aff. 24. adjudged by all the counfel.]

Br. Conufans, pl. 40. cites S. C. but S. P. does not fully appear.

—Fitzh. Conufans, pl. 57. cites S. C. & S. P. accordingly — S. P. but he fhall have only the tranfcript of it; for if they fail of right in the franchise, the words fhall be *rejumme* to the Bank again upon this original, and then the king's court fhall proceed upon the original there; per Choke. Br. Conufance, pl. 32. cites 37 H. 6. 27.

[3. A prefcription and confirmation of this to have the original, &c. with conufance of pleas, is not good for the caufe aforefaid, though it hath been feveral times allowed in eyre. 26 Aff. 24. adjudged by all the counfel.]

Br. Conufans, pl. 40. cites S. C. but S. P. does not clearly ap-

pear. — Fitzh. Conufans, pl. 57. cites S. C. & S. P. accordingly.

4. Where the king grants, to J. S. conufance of all pleas to be held before his bailiff licet fuerit pars, this is a good grant, per tot. Cur. contra if it was to be held before himfelf; for a man by juftice cannot be his own judge. Br. Patents, pl. 71. cites 21 E. 4. 47.

5. The king may grant conufance of pleas, but not otherwife than *fecundum legem & confuetudinem regni*; Arg. Show. 142. cites. 12 Rep. 51. [Hill. 5 Jac.]

6. By a charter of Q. Eliz. *cognitio placitorum, with exclusive words of non alibi*, &c. was given to the court of the vice chancellor of Cambridge, to proceed *fecundum legem & confuetudinem univerfitatis* in all cafes, where any of the body of the univerfity fhould be defendants, which charter was confirmed by act of parliament; per Cur. fuch grant is not good of itfelf without the help of an act of parliament; for though the crown may grant conufance of pleas to proceed *fecundum legem terræ*, yet it cannot to proceed by other laws; for that would be to make new laws, which the crown, as being but one branch of the legiflature, cannot do. 10 Mod. 125, 126. Hill. 11 Ann. B. R. Cambridge (Univerfity's) cafe.

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(H) Upon what Grant.
Upon a General Grant.

[1] A Man upon a general grant fhall not have conufance of pleas where he himfelf is party, and where the plea is to be held before himfelf. * 40 E. 3. 10. b. adjudged. † 8 H. 6. 21. b. Curia.]

* Br. Conufans, pl. 9. cites S. C. and Brooke fays, it ftems the demand

was difallowed, becaufe it had no allowance, nor had thefe words, *licet fuerit pars*. — Fitzh. Conufans,

fans, pl. 26. cites S. C. and that conufance was difallowed for reasons before mentioned by Brooke.

† Br. Conufans, pl. 27. cites 8 H. 6. 18. S. C. & S. P. by Martin, but he fays, that though the words *licet ipfemet fit pars* had been in the grant, yet it is not fufficient, unlefs the king had granted further, that where he himfelf is party, he might make another judge; for where he himfelf is party he cannot be a judge indifferent in his own cafe.

{ Fol. 402. [2. [So] in *trefpafs againft a mayor, and feveral of the commonalty*, the mayor and * commonalty fhall not have conufance upon a general grant of conufance, becaufe they cannot be judges in their own *caufe*. 38 E. 3. 15. b. Curia.]

† Fitzh. Conufans, pl. 15. cites S. C. — [3. But where the plea is *to be held before the fteward*, or bailiff, there conufance fhall be granted upon a general grant, *without the words licet ipfemet fit pars*, where the lord of the bailiff is a party. D. 4. 5 Ma. 157. 27. Dubitatur, † H. 7. 11. Contra † 12 H. 4. 13. 10 H. 6. 7. b.]

12 H. 4. 12. S. C. — Br. Conufans, pl. 20. cites S. C.

§ In fuch cafe the grant fhall be all-wed. Br. Conufans, pl. 20. cites 12 H. 4. 12. S. C. by Thirn. and Hull, but Hank. c contra and therefore Brooke adds a queft. — Fitzh. Conufans, pl. 21. cites S. C.

|| Br. Conufans, pl. 48. cites S. C. and Brooke fays, the reafon feems to be, becaufe it may be held before the fteward of the lord, who may be indifferent between the lord and the party, as the juftices of the king are between the king and his fubject, in an action between them.

Fitzh. Conufans, pl. 90. cites S. C. [5. Where conufance is granted *to be held before the bailiff*, if an action is brought *againft one of the bailiffs*, they fhall not have conufance thereof, for then the bailiff fhould be his own judge. 10 H. 4. 9.]

Fitzh. Conufans, pl. 90. cites S. C. [6. So in this cafe, if after the writ brought *new bailiffs are elected*, yet they fhall not have conufance, becaufe the writ was well brought at firft. 10 H. 4. 9.]

7. In a writ of entry againft the mayor and burgefles of B. they demanded conufance, and fhewed the charter, which was, that *nullus burgenfis inhabitans infra burgum prædictum placitet vel implacitetur de terris, tenementis, contractibus, &c. within the faid borough elfewhere out of it*, &c. per Cur. the whole body being impleaded in this action, they cannot have conufance of this plea, and fo were oufted of it. Bendl. 88. pl. 134. Paſch. 3 Eliz. Hunfton v. Bofton (Mayor and Burgefles in Lincolnſhire).

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(I) Special Grant.

Br. Conufans, pl. 27. cites 8 H. 6. 18. S. C. for where [1. IF conufance of pleas be granted, *licet ipfemet fit pars*, he fhall not have conufance in an action in which he himfelf is party, becaufe he fhall not be his own judge, unlefs it be granted

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granted further, that if he be party, that he may make another judge.
8 H. 6. 19. b.]

he himself is party, he cannot be an indifferent judge in his own case.

[2. But upon such grant, licet ipsemet sit pars, if it be granted, that if he be party, that the plea shall be held before his steward, he shall have conusance, for there the steward shall be judge.
8 H. 6. 20. b.]

Br. Conusance, pl. 27. cites 8 H. 6. 18. S. C. — Hob. 87. pl. 114.

per Hobart Ch. J. in delivering the opinion of the Court, in the case of Day v. Savage, S. P.

[3. If the grant be, that if any clerk of Oxford be impleaded, that the chancellor shall have conusance to be held before him, if the chancellor be sued, he shall not have conusance, though he himself be a clerk, for the words are not exprefs, licet ipsemet sit pars.
8 H. 6. 20. b.]

Br. Conusance, pl. 27. cites 8 H. 6. 18. S. C.

(K) Where they have Conusance of the Action, yet for a collateral Cause the Conusance shall not be granted.

Failure of Right.

[1. IF a fine be removed out of a franchise by writ of error, and comes in Banco Regis by mittimus, and after a scire facias is sued to have execution of it, the franchise shall not have conusance of it, because the record shall not be remanded de Banco Regis, and without it they cannot do right to the party. * 50 Aff. 9. adjudged. † 44 E. 3. 37. adjudged.]

* Br. Conusance, pl. 61. cites S. C. & S. P. accordingly, whether any error be assigned or not. The

case was, writ of error was sued in B. R. by which the record of a fine was removed out of the buffings, Oxon. inasmuch as they had erred in scire facias upon fine, as it is supposed, and no error was there assigned, by which he in remainder sued execution there by scire facias to have execution of the fine, and at the day the parties appeared, and the bailiffs of Oxon. demanded conusance by grant of King H. 3. that no burges shall be impleaded of land out of the will, and that they had held pleas, &c. and were ousted by judgment, because when the record comes into B. R. it shall not be remanded if error be assigned or not; and yet, when franktenement is pleaded of land in ancient demesne, and after it is proved to be of ancient demesne, it shall be remanded Ibid.

† Br. Conusance, pl. 13. cites S. C. but mentions the removal into B. but according to that Year-book it should be into B. R. as Roll cites it. — Gilb. Hist. of C. B. 156, 157. cites S. C. & S. P. ‡ for the king never parts with the records of his court. — Gilb. New Abr. 561. cites S. C. & S. P. in totidem verbis.

‡ [581]

[2. At the return of the exigent conusance shall not be granted for failure of right, for he cannot be restrained in the franchise to appear by attorney, and it is against the law to appear by attorney at the exigent. 3 H. 6. 10. b.]

[3. If a man comes by exigent in a writ of debt, conusance shall not be granted; because the defendant ought to remain in prison till he has agreed with the plaintiff, and the body cannot be delivered to the franchise. § 40 E. 3. 1. adjudged; so failure of right. Contra || 11 H. 4. 41. b. 43. b.]

§ Br. Conusance, pl. 8. cites 40 E. 3. 2. S. C. — Fitzh. Conusance, pl. 20. cites S. C.

pl. 25. cites S. C. — And Roll is misprinted, there being no fol. 1. but the title page.

|| Br. Conusance, pl. 18. cites 11 H. 4. 43. S. C. — Fitzh. Conusance, pl. 20. cites S. C. — See (L) pl. 5. S. C.

Br. Conu-
fians, pl. 8.
cites 40 E. 3.
2. S. C.

[4. So if in a plea of land the tenant makes default after default at the summons, conufance shall not be granted, because they cannot give judgment upon the default of record here. 40 E. 3. 1.]

Fol. 493.

[5. Not at the grand cape returned. 11 H. 4. 43. b. 14 H. 4. 20. b.]

Br. Conufance, pl. 8. cites 40 E. 3. 2. S. P. for they cannot do right to the party upon the default recorded here; quod nota.

Fitzh. Co-
nufians,
pl. 20. cites
S. C. —
Br. Conu-
fians, pl. 18.
cites S. C. & S. P.

[6. But vide 11 H. 4. 43. b. in an action upon the statute of labourers, if the defendant comes in ward at the first day, and conufance is demanded, it shall be granted, yet he shall not find mainprise to keep his day in the franchise. 11 H. 4. 43. b.]

accordingly; but then the plaintiff counted of a retainer in his franchise, and a departure to D. out of the franchise, and there the defendant was compelled to answer; for now the franchise cannot do right.

Fitzh. Co-
nufians, pl. 1.
cites S. C. —
Br. Conu-
fians, pl. 1. cites
S. C. ac-

[7. At the grand cape returned, conufance shall not be granted upon demand, though the tenant be an infant, for the failure of right; for though the infancy be a good cause to save the default, yet this is a default in law, and so the court once seised. 3 H. 6. 10. b.]

cordingly, and it is a laches of the party who would have had the conufance, and therefore now he shall not have the conufance; quod nota.

Fitzh. Co-
nufians, pl. 1.
cites S. C. —
but S. P.

[8. So if at the grand cape returned the demandant releases the default, yet conufance shall not be granted, for this affirms the default. 3 H. 6. 10. b.]

does not

appear. — Br. Conufians, pl. 1. cites S. C. & S. P. by Babb. for by these matters the court is lawfully seised.

[9. If conufance be demanded at the grand distrefs returned in a writ of debt, it shall be granted. 2 E. 3. 62. b. adjudged.]

Br. Conu-
fians, pl. 12.
cites S. C. & S. P. by
Kilton.

[10. After battail joined in a franchise in a writ of right upon a grant of conufance, it shall be returned in Banco, because the issue cannot be tried there. 44 E. 3. 29. b.]

* [582.]

Fitzh. Co-
nufians, pl. 6.
cites 8 H. 6.
30. S. C.

— Br. Co-
nufians,
pl. 28. cites
S. C. ac-

cordingly;
and it in this
case conu-

fance should be granted, it might be, that the one should recover the writing here, and the other should recover it in the franchise, which has no authority to warn the party out of their jurisdiction; besides, a recovery of the writing in one court, is no plea in the other court.

[11. If one brings detinue and counts of a bailment in a franchise, and another brings detinue for the same thing, and counts of a bailment in another place out of the franchise, and the defendant prays that they may interplead, and the franchise demands conufance* of the detinue, who counts of a bailment within the franchise, yet it shall not be granted, because then the defendant should be at a mischief, for it cannot have conufance of both, and so no interpleader could be there, and therefore if it should be granted, the defendant should be twice charged. 8 H. 6. 31. adjudged.]

and it in this case conufance should be granted, it might be, that the one should recover the writing here, and the other should recover it in the franchise, which has no authority to warn the party out of their jurisdiction; besides, a recovery of the writing in one court, is no plea in the other court.

In detinue of charters, when the plaintiff and garnishee interplead, and the one counts of a delivery in a franchise, and the other in guildable, then curia magis digna shall have the plea; for now by the interpleader it is as one and the same action, and not as two actions, and therefore is an intire thing, and not severable. Br. Conufance, pl. 28. cites 8 H. 6. 30. — But where a man brings formid. of land, part in a franchise, and part in guildable, the writ shall abate; for he may have one writ in the franchise, and the other in Bank. Ibid. — So if assise is brought, &c. Br. Conu-

fians, c.

Sancti, pl. 15. cités 8 H. 4. 7. per Gascoigne and Hull. — But where it is brought ut supra, where the lord of the franchise has only *retrains breuium*, the writ shall not abate; for the sheriff may serve the writ for the guildable, and the bailiff of the franchise for the land in franchise; and so in the one case there shall be two writs, and in the other but one. Ibid.

[12. If a plea be removed out of a franchise because of a foreign voucher, if in Banco the tenant waives the voucher, and pleads in bar, or the voucher is determined, yet the franchise shall not have conufance of this again, because there was once a failure of right there, though not by their negligence. * 11 H. 4. 28. 87. b. † 14 H. 4. 25. b.]

* Br. Conufans, pl. 16. S. P. cites 11 H. 4. 27. † Br. Re-fummons, pl. 13. cites S. C.

[13. If conufance of pleas be granted to a franchise, and after an affise is there brought (admitting this to be a plea within their grant), and the tenant pleads, that by this grant they cannot hold plea originally, but shall have conufance out of other courts, which plea they there over-rule, and award the affise, by which the disseisin is found, and the tenant ousted of the possession, if the tenant that is ousted brings an affise after upon this ouster, the franchise shall not have conufance, because they have once failed of their right. 38 Aff. 25. this is pleaded.]

[14. In trespasss, if the defendant pleads villeinage in the plaintiff, and after conufance is demanded, it shall be granted, though the villeinage cannot be tried in the franchise, because it may be that he will plead another plea, and not this, when he comes there. 26 E. 3. 73. b.]

Fitch. Co-nufans, pl. 86. cites S. C. — An inferior court must, upon co-

nufance allowed, proceed upon the same plea and declaration. Hardr. 308. Arg. cites Co. Litt. 182. and 4 Inf. 113. and that they cannot compel the plaintiff to declare anew. But I do not observe any such point in the places cited.

[15. A trespass lies not in a franchise for a trespass done in a place out of the franchise, because they cannot try it there, for they cannot compel a jury to come from the place. 1 E. 3. 24. adjudged.]

[16. If a trespass be brought of a trespass within a franchise, against a foreigner that hath nothing within the franchise, conufance shall not be granted, because they cannot do right to the party, for they have no power to amesne a stranger who hath nothing within the franchise to answer. 22 Aff. 83.]

Gilb. Hist. of C. B. 157. cites S. C. — Gilb. New Abr. 561. cites S. C.

[17. So it is of an action of debt brought against such foreigner, upon a contract within a franchise. 22 Aff. 83. for the cause aforesaid.]

[18. In a conspiracy against two, for a conspiracy within a franchise, of which one is a foreigner, and the other within the franchise, conufance * shall not be granted, because the action is entire, and they cannot do right there against the foreigner. 22 Aff. 8.]

* [583] Fol. 404.

is brought against two, whereof the one of them is of the Chancery, the action cannot be severed, and therefore he shall not have the privilege. Br. Privilege, pl. 7. cites 20 H. 6. 30.

So where conspiracy

[19. But if a trespass be brought against them for a trespass within the franchise, conufance shall be granted, because he might have had several actions, and so his joint bringing of the action shall not take away the conufance. 22 Aff. 83.]

Conufance of Pleas.

20. If it appears to the Court, that the party defendant has *nothing within the franchise, nor dwells there*, so that they cannot bring him in to answer, conufance shall not be granted. Br. Conufance, pl. 39. cites 22 Aff. 81.

21. Where *præcipe quod reddat of land* is brought in Bank, and other præcipe of the same land in a franchise, there if the one recovers and enters, the writ is abated, and the tenant shall plead it. Br. Conufance, pl. 28. cites 8 H. 6. 30.

22. But it is no plea in detinue of writings or chattels; for this shall not abate the writ of the other, unless the other be made privy by garnishment, which the franchise cannot do, therefore shall not have conufance. Ibid.

23. The mayor and bailiffs of Coventry had conufance in affise in the county of Warwick, and the tenant in C. pleaded a plea which they could not try, by which the plea and affise were remanded to the justices of affise in the county of W. and there the parties appeared, and the mayor and bailiffs at another time demanded conufance again, upon which they were adjourned into C.B. and there by Newton, Fulth. and Afcue, where the franchise fails of right to the party, or if the franchise cannot do right because they have not power, there the franchise shall lose the conufance, and shall not have the conufance again. Br. Conufance, pl. 29. cites 22 H. 6. 58, 59.

24. Debt in London, the defendant pleaded that the obligation upon which, &c. was made at Norwich by dures, which was found for the defendant, and the plaintiff brought attain, and those of Norwich demanded conufance of the plea; and by Needham, Littleton, and Jenney, they shall not have conufance; for they cannot award execution in London, nor award cape or exigent to deny the deed, and also they have not the record in N. Br. Conufance, pl. 53. cites 8 E. 4. 6.

25. And per Danby, if it paffes for the plaintiff in the action, he shall have but his first action; contra per Littleton and Needham; for he shall recover his debt, as where the first verdict had paffed for him, which was adjudged, 8 H. 4. as it is laid there. Ibid.

26. Debt upon an obligation in London, the defendant said, that it was made by dures at York, upon which they were at issue, that at large at London, and the record was removed into Bank by writ of Chancery, and the plaintiff prayed venire facias upon the issue joined in London, and per Thirn. it is reasonable that it should be tried in Bank, and remanded into London; but H.1. contra; for by the foreign plea they are out of the jurisdiction, and by this they shall not have any power to take any issue thereupon; for it is in vain to take issue which cannot be tried by them, and so is the best opinion, and the law, as it seems; and per Hank. in fuch case of foreign plea in franchise, it was usual, in ancient time, to condemn the defendant, because he used a plea which could not be tried there, but the use is contrary now; but where a man pleads a plea in Bank *ultra mare*, he shall be condemned at this day, because it cannot be tried in England,

England, as it was said Mich. 36 H. 8. And per tot. Cur. in the case above, where *franchise demands conusance out of the Bench*, and the defendant pleads *foreign release*, * the plaintiff shall have *re- summons*; for this is a failure of right, and there, by the reporter, they shall plead all de novo, and after the plea discontinued; but it seems the law is with Hill. Br. Jurisdiction, pl. 29. cites 14 E. 4. 25.

27. In *ancient demesne*, if they put them in *grand assise* now the plea shall be removed, and yet the tenements shall remain ancient demesne, but because they failed of justice, it shall be removed, per Cateby. Per Townsend, if they cannot arraign grand assise, or grand inquest, according to the custom of grand assise, then of necessity it ought to be removed. Br. Cause a Remover, pl. 51. cites 1 H. 7. 29, 30.

28. Recordare to the sheriff to remove plaint of land out of the court of K. which is held before the bailiffs and suitors of K. because the plaintiff in the court of K. was one of the bailiffs there, and a good cause to remove the plea, and distress awarded to send the record, and it was in writ of right in court baron of K. as it seems, and the sheriff returned that the bailiffs and the suitors would not send the record, and therefore distress issued. Br. Cause a Remover, pl. 53. cites 1 H. 7. 29. & 26 H. 8. 4.

29. Conusance of pleas is never to be allowed unless the inferior court can give remedy; per Ld. K. Guildford. 2 Vent. 363. Hill. 35 & 36 Car. 2. in Canc.

(L) What shall be said an Action arising within the Franchise.

[And where the Franchise shall not have Conusance in respect of Part only being done within it.]

[1. WHERE an action is brought of a thing done partly within a franchise, and partly out, if it be a thing that cannot be severed, then the franchise shall not have conusance. 8 H. 6. 31. b.]

[2. As in trespass for a battery in one place, and continued in another place, if one of the places be within a franchise, yet conusance shall not be granted, because it is an entire trespass. 8 H. 6. 31. b.]

where the action is intire, as in case where a man arrests another in guildable, and imprisons him in franchise, action will lie at common law; for where it is intire, there majus dignum trahit ad se minus dignum; agreed. Br. Conusance, pl. 14. cites 46 E. 3. 8. — Fish. Conusance, pl. 34. cites S. C. & S. P. accordingly.

Br. Conusance, pl. 28. cites S. C. — If a man brings action of land in franchise, and of land guildable, the writ shall abate; but

[3. If one be summoned against a prohibition within a franchise, to appear at a place within the franchise, but sentence is given out of the franchise, if an attachment upon the prohibition is brought, conusance shall not be granted, for the principal grievance is where the sentence was. 46 Ed. 3. 8. b.]

Br. Conusance, pl. 14. cites S. C. — Fish. Conusance, pl. 34. cites S. C.

U u 2

[4. If

Br. Jurisdiction, [4. If a lease be made in *Middlesex of land in Durham*, he cannot have an action of debt upon this in Durham. 11 H. 4. 40.]
 pl. 25. cites S. C. it shall be tried in the county palatine, and remanded hither.—Br. Trial, pl. 27. cites S. C. —Br. Cinque Ports, at the end of pl. 8. cites S. C. —Fitzh. Debt, pl. 112. cites S. C.

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Br. Conufance, pl. 18. [5. If a *retainer of a servant be out of a franchise*, and the *departure within a franchise*, yet the action upon the statute of labourers lies not within the franchise. 11 H. 4. 44.]
 cites S. C. for now the franchise cannot do right.

But where, [6. If an *account be brought of a receipt within the franchise*,
 in account, conufance shall be granted of it. 29 Ed. 3. 35. b.]
 as bailiff and receiver in *A. and B.* the bishop of *E.* demanded conufance of the plea, because *A.* is within the ifle of *Ely*, and because this *action may be severed*, and the king have conufance in *B.* and the bishop conufance in *A.* therefore the writ was abated by award; for it is no reason that by an ill writ a man shall lose his right. Br. Conufance, pl. 30. cites 24 E. 3. 62. —But see elsewhere, that of rent granted out of land in *A. and B.* it is otherwise; for it is *intire*, and cannot be severed; note a diversity. Ibid. —And it is said, that in *præcipe quod reddat of land in A. and B.* the writ shall abate also; for this may be severed. Ibid.

a Roll.
 Rep. 48.
 Browne v.
 Carrington,
 S. C. re-
 solved that
 the judg-
 ment was
 erroneous;
 but Do-

[7. An *heir cannot be sued upon the obligation of his ancestor* within a borough, where he hath not *assets within the jurisdiction* of the Court, but without. Mich. 16 Jac. B. R. between BOURN AND CARRINGTON, adjudged in a writ of error where the first judgment was reversed, because in the pleading there was no place alleged where the assets were, which might be out of the jurisdiction of the Court.]

deridge J. said, that *though the assets are not alleged by the party to be within the jurisdiction, yet if the jury find them to be within the jurisdiction it is sufficient.* —The plaintiff ought to allege assets in some certain place; whether this action be brought in a town corporate, which has a limited jurisdiction, or at Westminster, the jury in both cases, upon this issue, may find assets in any other place. Adjudged and affirmed in error. Jenk. 333. pl. 69. —Cro. J. 502. pl. 13. S. C. and judgment reversed; but says, that in the same term a writ of error was brought of a judgment in Litchfield, betwixt CLEKE AND BROUGHTON, where in debt against the heir, upon an obligation of his father, the defendant pleaded *riens per defcent*. The plaintiff replies, that he had assets by descent, but they did not find any place where, and the plaintiff had judgment, and this judgment was affirmed, although it were objected, that this being a private jurisdiction, they had no authority to inquire if any thing was out thereof; and that this differs from the case of actions brought in the king's courts, which have a general jurisdiction; sed non allocatur; for this inquiry is good enough; as an inquiry may be of assets in Ireland; wherefore the judgment was affirmed. —See Tit. Trial (M. f).

8. *Affise* was brought of rent reserved upon a lease for life of land, part in *guildable* and part in *franchise* of *D.* and the bailiff demanded conufance; per Thorpe he shall have conufance, for the rent is severable, and therefore the plaintiff shall be put to two originals. But several e contra, and so is the law as it seems; for the rent is *one and the same rent*, and therefore *shall not have two originals, no more than of rent issuing out of land in two counties*, [in which case] *affise* does not lie, and as here the *affise* shall be at common law, pro toto; for *Curia magis digna*, &c. Br. Conufance, pl. 60. cites 22 Aff. 52.

9. *Trespass against two*, and the one has nothing within the franchise, and the bailiffs demanded conufance of the plea against the other, and had conufance by award, though they could not do right to the parties, for they cannot bring the one in to answer, because

because he does not come there, nor has he land nor goods there to be distrained nor attached; the reason was, because the plaintiff might sever his action, and have one action against the one, and another against the other. Br. Conufance, pl. 39. cites 22 Aff. 81.

10. But if it was in conspiracy, &c. where the action cannot be severed, there he shall not have conufance. Ibid.

11. A man leased land which is in a franchise by deed indented at another place out of the franchise, with clause of re-entry, and for the rent arrear before his re-entry he brought debt, and the bailiff demanded conufance, because the land whereof, &c. is in the franchise, & non allocatur, because the action is brought out of the franchise, in the place where the deed bore date. Br. Conufance, pl. 59. cites 38 E. 3. 22.

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12. If a man brings action of land in a franchise, and of land guildable, the writ shall abate, and he shall have several actions. Br. Conufance, pl. 14. cites 46 E. 3. 8.

13. But where the action is intire, as in case where a man takes another in guildable, and imprisons him in franchise, action lies at the common law, for where it is intire, there majus dignum trahit ad se minus. Ibid.

14. So elfewhere of recovery of land guildable and land in a franchise. Ibid.

(M) At what Time it may be demanded.

[1. Conufance ought to be demanded the first day, otherwise it shall not be allowed. 20 H. 6. 32. b.]

Br. Privilege, pl. 7. cites S. C.

& S. P. by Yelverton.

[2. When the place appears in the writ where the action arose, there conufance ought to be demanded the first day, because it appears whether conufance belongs to them, but otherwise it is e contra.

* Br. Conufance, pl. 7. cites S. C.

* 11 H. 4. 41. b. † 14 H. 4. 20. b. ‡ 3 H. 6. 30. b. 2 Ed. 3. 62. b.]

— Fitzh. Conufance, pl. 19. cites S. C.

† Br. Conufance, pl. 21. cites S. C. — Fitzh. Conufance, pl. 22. cites S. C.

‡ Br. Conufance, pl. 3. cites S. C. — Fitzh. Conufance, pl. 3. cites S. C.

[3. As in trespasss, conufance ought to be demanded the first day before the count, if the party makes default, because the place of the trespasss appears in the writ. 11 H. 4. 41. b. 43. b. 14 H. 4. 20. b. 3 H. 6. 30. b.]

See the notes to pl. 2. supra.

[4. But otherwise it is in a writ of debt. 11 H. 4. 41. b. 43. b. because the place of contract does not appear in the writ. 14 H. 4. 20. b. 3 H. 6. 30. b. 2 E. 3. 62. b.]

See the references at pl. 2. supra.

[5. The same law in detinue. 3 H. 6. 30. b.]

Fol. 405.

See the references at pl. 2. supra.

[6. But these cases are to be intended when the writ is brought in a county within which the franchise is, for there it may be, that

Fitzh. Conufance, pl. 3. cites S. C.

—Br. Conufans, pl. 3. cites S. C.

Br. Conufans, pl. 3. cites S. C. —Fitzh. Conufans, pl. 3. cites S. C. —S. P. Jenk. 34. pl. 66.

the contract was within the franchise, or without in the county, for this ftands indifferently by the fuppofal of the writ, and fo the truth cannot be known by the writ before the court. 3 H. 6. 31.]

[7. But if all the town be a county by itfelf, and no franchise within it, as Bristol, there, becaufe they are afcertained by the writ, they ought to demand conufance at the firft day. 3 H. 6. 31, adjudged.]

Fitzh. Conufans, pl. 22. cites S. C. —Br. Conufans, pl. 21. cites S. C. he ought to

[8. In a writ, if conufance be not demanded at the return of the original, they fhall not have conufance after at the return of the *capias*; * for though upon the return of the original the defendant made default; and fo the conufance cannot then be granted, yet the demand ought to be at the firft day, and this fhall be entered, 14 H. 4. 20. Curia.]

challenge it at the day of the return of the original, viz. the firft day, and every day after, and his challenge fhall be entered, and yet he fhall not have it allowed till the plaintiff and defendant are in court; per Cur.

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Br. Conufance, pl. 1. cites 3 H. 6. 10.

[9. In an *affife* againft two, if the *affife* be awarded againft one by default, if conufance be after demanded for the other that appears, it fhall not be granted; for the Court is *feifed* by the default of one, and the original is intire. 3 H. 6. 10. 14. b.]

Affife of land in G. the bailiffs of G. demand conufance of the plea, and the plaintiff laid, that the fame day another affife was awarded of reventments in G. and they did not demand the conufance, and fo have fucceeded, &c. and yet they fhall have conufance, for they may demand it in one action, and omit it in another action. Br. Conufance, pl. 2. cites 3 H. 6. 14.

[10. But if a man brings feveral *affifes*, and one is awarded by default, yet for the other conufance fhall be granted upon demand at the fame day; for he hath *election* to have conufance of any which he pleafes. 3 H. 6. 14. b.]

S.P. though they t at de-manded conufance fuid that this default is by

[11. In an *affife*, if the tenant makes default by which the *affife* is to be awarded by default; if conufance is demanded before the *affife* is awarded, yet it fhall not be granted, 8 H. 6. 7. b. adjudged.]

collufion between the plaintiff and the tenant to make them lofe their conufance, and prayed that it may be *oppofed*, &c. and notwithstanding it was awarded a default, and none appeared, then, by the default, the Court is intitled to award the *affife* by default. Br. Conufance, pl. 26. cites S. C. —Br. Default, pl. 36. cites S. C. —Fitzh. Conufans, pl. 7. cites S. C.

Fitzh. Conufans, pl. 71. cites S. C. —Br. Conufans, pl. 37. cites S. C.

[12. In *trespafs* againft two, if one makes default, and the other comes and pleads not guilty, conufance may be demanded now though it fhall not be granted till the other comes, yet this demand fhall be entered, and he fhall have it when the other appears, 22 Aff. 50.]

and Brooke fays it feems to him, that he fhall have conufance in this action.

[13. In *trespafs* againft two, if conufance be not demanded every day of the procefs continued, it fhall not be granted, for it ought to be demanded at every day of the procefs continued, 22 Aff. 83.]

14. In præcipe quod reddat, J. N. demanded conufance, and had it *after the tenant had made attorney in Bank, and day given in the franchise, and at the day the tenant caſt effoin, and the demandant challenged it, becauſe he had made attorney in Bank, who is not removed, and there it is awarded that the attorney in Bank ſhall remain in the franchise till he be removed; quod nota; that this is of record in the franchise, and yet the warrant was not ſent to the franchise, nor was it comprized in the record which was ſent into the franchise that he is attorney there, and yet judgment ut ſupra.* Br. Conufance, pl. 25. cites 21 E. 3. 45. *ſeems to be there, inasmuch as the party ought to have ſued reſummons in this caſe; quære, for it was not adjudged in that point.* Br. Peremptory, pl. 51. cites 21 E. 3. 61.

Br. Peremptory, pl. 51. cites 21 E. 3. 61. [S. C.] this effoin is not good, and therefore they ought to award ſeiſin of the land, or petit cape, per Seton; the reaſon

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Fitch. Conufance, pl. 19. cites S. C. & S. P. by Thirninga

15. The difference with reſpect to the time of claiming conufance is laid down to be, that *where the matter is local*, ſo that it appears upon the face of the record that there is ground for ſuch a claim, it muſt be made primo die, viz. when the writ was returned; but where the matter is *transitory*, it muſt be made upon the day given to plead. 10 Mod. 127. Arg. cites 11 H. 4. 41. and ſays, the reaſon is, that otherwiſe there would be a failure of juſtice, unleſs ſuch claims were made *as ſoon as poſſible*.

16. Conufance may be demanded as well *upon the original* as upon the reſummons, and the cauſe may be traiveredſed as well upon the one as upon the other. Br. Conufance, pl. 5. cites 34 H. 6. 53.

17. *Præcipe quod reddat; the tenant is effoined, and no challenge entered to claim any conufance of plea, there, at the day of effoin, if he demands conufance, he ſhall not have it; for the court is ſeiſed without challenge; quod nota.* Br. Conufance, pl. 6. cites 35 H. 6. 24.

18. *Replegiare was removed out of the county into B. R. and defendant took continuance; and at the day the ſame defendant demanded conufance, which was diſallowed, becauſe demanded after the continuance, and not the firſt day; beſides, himſelf being defendant, knew well when he diſtrained; and whether it was within his juřiſdiction or not, and alſo his charter, by which, &c. bore date in the time of William the Conqueror, before time of memory, and allowed in Bank, but not in eyre, and therefore was diſallowed.* Br. Conufance, pl. 51. cites 9 H. 7. 10.

19. *And per Curiam, conufance may be demanded by attorney, and ſo ſee that allowance in Banco without allowance in eyre ſhall not ſervey; but other charters and records, which are not of liberties, may be allowed though they are before time of memory, and there was exception taken becauſe the charter had not theſe words licet fuerit pars.* Ibid.

20. As to the time, it muſt be demanded *before an imparlance, and the ſame term the writ is returnable, after the defendant appears, becauſe till he appears there is no cauſe in Court, otherwiſe there would be a delay of juſtice; for if after imparlance, when the defendant has a day already allowed him, he would have two days, ſince when the conufance is allowed, the franchise*
prefixes

prefixes a day to both parties to appear before them, and it is the lord's laches if he does not come soon enough not to delay the parties. Gilb. Hist. of C. B. 158.

21. In indeb. ass. the bail was put in in Easter term. The 5th day in Trinity term the university of Cambridge came and demanded conusance (in a proper manner). The entry is of the last term. It being objected that this was irregular, because the defendant not pleading within four days of Trin. term, he ought to have an imparlance; to which it was answered, that the demand of conusance was so late because of an agreement between the plaintiff and defendant's attorney; but it was said per Cur. that the demanding of conusance is a transaction between the two courts, and it must be done in court, and not between the attorneys. It must be demanded either by the party that claims it, or by his bailiff or attorney, and not by the defendant. (N. B. The record here was entered up without an imparlance, but it was now prayed to be done.) This cannot be a plea of Easter term, because it came not within four days. The antient practice was, to make all pleading at the bar, but now the giving the pleadings to the plaintiff's attorney in writing is instead thereof. In this matter the former method is to be pursued, because the Court may see that there is just ground of conusance. The party may reply, that the cause does not come within the conusance demanded, but still the Court is concerned; for a day must be given over; the defendant's attorney cannot confess this, but the party, who claims it, must come into court, and produce his letters patents. Here the plaintiff might reject the imparlance, and yet upon praying that imparlance an allowance of conusance is demanded. This demand by the attorney is nothing. It is a question of jurisdiction between the two Courts. If the Court here sees that there is such a jurisdiction, they are to send a transcript of the record to the court below, and to give the parties a day. If the lord will not proceed at the day given, the Court here may resummon the party, &c. Hereupon a rule was made, that the record should be set right, and an imparlance entered, and then it will be the same thing as if the lord had come into court the 5th day. Mich. 11 Ann. B. R. Pern v. Manners.

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22. And in Hill. term the charters were produced, and an exemplification of an act of parliament which confirmed them. It appeared that this was an exclusive jurisdiction granted, &c. viz. that no justices or judges should intermeddle, &c. and that the party should be sued before the Chancellor, &c. *solummodo & non alibi*. There is a difference between a conusance generally, and an exclusive conusance; for the latter may be either demanded by the lord, or pleaded by the party; the lord ought to come the day he knows that his franchise is invaded. The jurisdiction here granted by the charter being such as was inconsistent with the common law, there wanted an act of parliament, or else the charter could not subsist. There is no hardship in coming in the first day, viz. the day the declaration is delivered, which day is enlarged, and if the party comes within four days of the subsequent term, it is as if he came in of the former term; if the party lives within the jurisdiction, it must be known when he was arrested; if he did

not live there no justice can be done by them; the case of an effoin is the same with the case here; for that is an excuse to the Court to let them know he cannot come, and therefore it would be odd that he should be excluded from pleading any plea that he lawfully might; but though this is the first day to the party, yet it is the second day to the lord; so it is in case of an imparlance, for that is the second day to the lord. *As to the manner and time of demanding it, the charters and act are silent, but every thing ought to be laid before the Court, together with the condition and circumstances of the party, whether he be a member or servant of the university; this is a fact triable by the Court here; the lord need not come at the return of the writ, for nothing in this case appears, till the declaration, how the debt did arise; but if he might come at any time, the plaintiff would be at a great disadvantage. The authority of *Hard. 505, 506. as to what Ld. Ch. B. Hale says, is of little weight, neither is there any thing in that case to the purpose here; what Hale says that any one may demand conusance, cannot be maintained; it is not only the right of the university, but it is also of the party, if he will plead it; and shall a stranger come and obtain this? The proceedings here, in case of an exclusive jurisdiction, are not merely null and void, though the charter says, that all writs shall be null; it is but a franchise which doth not take away the jurisdiction of Westminster-Hall, unless it be claimed; a conusance generally must be demanded, but an exclusive one may be either pleaded by the party, or demanded by the lord. If it were a mere nullity, trespasss would lie against the sheriff or officer; but it is a franchise, which must be claimed, and if it is so, it shall be allowed, but it doth not take away the jurisdiction of the courts here. In case of a bare conusance, a day is given to the parties only, and a transcript is sent hence, and if upon this there is a failure of justice below, there shall be a resummons, but in the other case there is a stop, for there is no day given, as where the party pleads it. The crown could not grant pleas, to proceed secundum leges & consuetudines of that place, but it could be only to proceed according to law, and therefore the act was of use to enable them to proceed by another method than the law did allow of, whereupon costs were prayed, sed non allocatur. Hill. 11 Ann. B. R. Pern v. Manners, alias Cambridge (University's case).*

* The case of Castle v. Litchfield.

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23. An action of trespasss was brought in Trin. term 12 & 13 Geo. 2. for an assault and battery, and false imprisonment, by an attorney of this court.

Defendants in the same term plead a joint plea, viz. as to the wounding, and part of the imprisonment, not guilty, and as to the rest, they plead specially the privileges of the university of Oxford, and set forth the charter, and the act of parliament of the 13 Eliz. by which the charter is confirmed; *that defendants Trahern is proctor of the university, and, as such, has power to apprehend any person making disturbance within the university; that finding the plaintiff making an affray late at night, he commanded him to keep the peace, but that instead thereof the plaintiff beat the defendant, whereupon*

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whereupon defendant laid his hands gently upon him, and committed him to gaol: that the other defendant, Etty, is gaoler of the gaol, and received him, being so lawfully committed, and traverse their being guilty of any other trespass.

Plaintiff imparles till Mich. term, and then replies; and admits the privileges of the university, &c. but denies the facts for which they imprisoned him, and says they took him of their own wrong without such cause, and tenders an issue upon the fact of the disturbance.

After this the university of Oxford, (by the Chancellor,) comes and claims consuſance, setting forth the privileges of the university, and relying principally upon a charter of the 1st of April, 14 H. 8. by which the king grants to the university the consuſance of all causes, where either plaintiff or defendant is a member thereof, though the cause of action arise in any part of the kingdom, with an exclusive clause that no justice (and particularly mentions the judges of this court) shall presume to intermeddle in any case arising within the jurisdiction of the university. They then set forth the stat. of Eliz. which confirms all their privileges, and consequently this of the exclusive jurisdiction, and that this consuſance was allowed to them in Easter term, 9 Ann. B.R. and thereupon claim consuſance of the cause.

Upon this case two questions arise, 1st, Whether the university have claimed this consuſance in time or not? 2dly, If they have, whether they are intitled to the consuſance of this particular cause?

But the first only has been spoke to, because if we are of opinion against the university upon that, it will be unnecessary to determine the second.

And upon great consideration we are of opinion, that the university have not claimed in time, both from the reason of the thing, and from several authorities in which this has been determined.

The time required for the university to come in is before imparlance, whereas in this case they have not come till after plea and replication.

And though this is said to be hard upon the university, because they may not know any cause was depending, and therefore could not come so early, yet we think it would be much harder, on the other side, if it was otherwise; for if not till after imparlance, or plea pleaded, when are they to come? They may as well come at any time before judgment, and this would create great delay and expence, if after matters are brought to a single issue to be tried, the university can come and make all go for nothing.

Besides, the university, when they come to judge, must judge not according to the law of the land, but the civil law, and though it must be that the party be tried by another law than that of the land, when an act of parliament gives such a jurisdiction, and it is not in the power of the courts at Westminster to help it, yet we are to take care to keep it in its due bounds, and

and that it be claimed in proper time. This jurisdiction is so contrary to the laws of the land, that it could not be granted even by the king himself, unless by act of parliament; for it has been determined, that it is *not in the power of the crown to create a new court of equity*, because such a court does not proceed according to the rules of law. And the same reason holds as to this court of the university, which determines men's properties without juries, and by a different law; so that without an act of parliament no such conusance at all could be allowed to the university; and this was the opinion of the Court in the case of *BOURNE v. MANNERS, Hill. 11 Ann. B. R. where the university came five days after imparlance, and the Court held it was too late, that they ought to have come the first day, to prevent a delay of justice, and because it took away the law of the land; and accordingly the claim was disallowed. Indeed, it was not the case of this university, but of Cambridge; but upon comparing the two charters, that of Cambridge has rather, if possible, a larger exclusive jurisdiction, so that it is a case in point.

* Alias
Perne v.
Manners.
See pl. 21,
22. supra,
and tit. Uni-
versity (K.)
pl. 12.

In that case were cited two cases in the Year-books, one in 6 H. 7. 9. b. the other in 16 H. 7. 16. a. where it was expressly adjudged, that to claim conusance the party must come before imparlance.

This case was cited and allowed, and the Court were of the same opinion in the case of v. Warren, 12 Geo. 1. B. R.

The same point was determined in the case of this very university, Trin. 1 Geo. 2. WOOD v. GRAHAM, according to a note I have had of it from a gentleman at the bar.

As to the cases cited, that in Latch. 83, 84. where it is said, that an ancient demesne may be pleaded after imparlance, was cited as a parallel case. But it is remarkable, that the Court in allowing it, admitted it to be a single case, and said it was otherwise in all other cases except that; and when one considers the particular case of *ancient demesne*, it stands upon a quite different reason, inasmuch that a man may come after judgment; for though a fine be perfected, or a judgment in a real action given, yet the tenant may come and reverse the fine or judgment by writ of deceit; and the reason is, because if he was not allowed to do it, he would lose the privilege of ancient demesne for ever; for so long as such fine or judgment stands in force, it appears to be land pleadable at common law. But the present case is very different, for though we should disallow this claim of conusance, the university will only lose it as to this particular cause; but their jurisdiction remains the same in any other cause, provided they come in time.

Another case was laid before me, determined so long ago as Hill. 12 E. 3. in the court of Exchequer, where, in an action of trespass, the Court granted a writ, directed to the university of Oxford, to have the conusance of the cause, non obstante that they did not claim it at the return of the writ, but staid till the parties had pleaded; but this determination is expressly contrary

to

to the opinion we are of, and especially as it is not only before the stat of Q. Eliz. but even before the charter of H. 8. upon which the university put their case, so that I can pay no regard to the authority of it, but must consider it as the effect of power, and not of judgment.

See tit. Uni-
versity (K)
pl. 12.

One more was mentioned, and that was the case of **ALDRIDGE v. DR. STRATFORD** in Canc. Trin. 12 Ann. where Lord Harcourt determined contrary to our opinion, but as it was a judgment given without one single reason, and contrary to strong and unanswerable reasons given by himself a little before in the same cause, I have no regard to it. I shall never pay any regard to a judgment founded either on fear or favour.

[592] As to the second question, whether the university's privilege will hold in the case of an attorney, as we have rejected the claim of conusance, being made too late, it is not necessary to say any thing upon it, but as it may hereafter come in question, I would mention some cases which may be proper to be considered, viz. in Litt. R. 304. 1 Roll. 489. 3 Leon. 149. the privilege of an attorney's suing in his proper court will be preferred; for it is a privilege time out of mind, and is for the sake of justice, and all the people of England, and that therefore a king's charter will not deprive him of it, nor even an act of parliament, without exprefs words.

I shall be as tender of the privileges of the university as any man living, and have a great veneration for that body, yet I shall always endeavour to support trials by juries, upon which all that we have, our liberties and properties, and lives depend, and prevent the incroachment of any jurisdiction whatever. The conusance was disallowed. Per Willes Ch. J. Mich. 14 Geo. 2. **C. B. Wells v. Trahern and ETTY.**

(M. 2) Conusance; how to be demanded and entered. Proceedings and Pleadings.

1. **A** Count; conusance was demanded by the *mayor and bailiffs of Coventry*, and they shew a charter to this purpose; *the demandant does not counterplead the franchise, but a stranger to the plea assigns reasons to the Court, that this franchise ought not to be allowed; & non allocatur.* If the demandant in a plea of land counterpleads the franchise, and the tenant joins with the claim of the franchise, and it is found against the franchise, the demandant shall recover the land; but if it be found against the demandant, the writ shall abate. Jenk. 18. pl. 32. cites 20 E. 3. Fitzh. Conusance, 46.

2. The king grants conusance to A. of pleas arising within certain bounds; the king grants to B. the like conusance within the same bounds; C. brings a præcipe quod reddat against D. for land within those bounds; both A. and B. claim conusance; the demandant and tenant agree to the conusance, but the tenant did not join
with

with either of the patentees. This controversy between the patentees shall not be tried in this case, because of the delay of the demandant, which such trial would occasion; but by all the counsel the *conufance in this case shall not be granted to him who first demanded it*; and the *right of the said patentees shall be tried in another action between them.* Jenk. 19. pl. 36. cites 20 E. 3. Fitzh. Conufance, 46.

3. In affise, a man may challenge a franchise *by attorney, if he has warrant* to challenge the liberty; quod nota; per Berff. and so it is usually done for the city of London in the Exchequer, B. R. and C. B. Br. Conufance, pl. 36. cites 22 Aff. 14.

Conufance of pleas is not well demanded by attorney, unless he has

a warrant of attorney in Latin, and he must have it present in court, and saying that it is in his chamber, is not sufficient; per Cur. Sid. 103. pl. 9. Hill. 14 & 15 Car. 2. B. R. The Bishop of Ely's case.

4. *Trespafs against two* in the city of York; the one came, and the other made default, and he who appeared pleaded not guilty, and the bailiffs of York prayed conufance of the plea, and Thorp made them enter the claim, and give *idem dies* to the other, for the mischief of the franchise; quære, if by this he shall have conufance in this case? or if he shall have it hereafter? Brooke says, it seems to him, that they shall have conufance in this action, for in other actions he shall have conufance, though he did not demand it now. Br. Conufance, pl. 37. cites 22 Aff. 50.

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5. Note, that by conufance of pleas granted by the king, the franchise *shall make such usual process and execution as is at common law*, for all this appertains to the conufance of pleas. Br. Grants, pl. 171. cites 22 Aff. 61.

6. In account conufance of plea shall *not be alleged by the defendant, but shall be demanded by the bailiff of the franchise*; per Thorp J. and per omnes, and otherwise it shall not be granted; quod nota. Br. Conufance, pl. 31. cites 39 E. 3. 17.

There is a diversity between a franchise to demand conufance, and

a franchise *ubi breve domini regis non currit*; for in the first case the tenant or defendant shall not plead it, but the lord of the franchise must demand conufance, but in the other case the defendant may plead it to the writ. 2 Inst. 224. cap. 42. cites in Marg. 39 E. 3. 17. 30 Aff. 1. 8 E. 3. 22.

7. Refummons is sued out of a franchise for failure of right for conufance of the plea granted, and the *bailiff came and traversed the cause, and his challenge was not entered upon the effoin*, which was *cast by the tenant upon the refummons.* Br. Conufance, pl. 66. cites 39 E. 3. 17.

8. Note, that the defendant cannot *challenge the franchise, inasmuch as conufance of plea is granted there*, but the bailiffs of the franchise shall demand it. Br. Conufance, pl. 67. cites 39 E. 3. 17.

9. *Contra* it seems where it is granted *that none of the vill shall be impleaded but in the vill before the steward, &c.* For in this every inhabitant has interest. *Contra* of conufance of pleas granted; note a diversity. Ibid.

10. Where conufance shall be granted *nothing shall be sent into the franchise but the original*, and this at such time as the franchise may do right to the parties, as the court of the king may; quod nota. Br. Conufance, pl. 8. cites 40 E. 3. 2.

11. Record

Conufance of Pleas.

11. Record which is *removed* out of a franchise by error shall be sent into Chancery, and thence into B. R. by mittimus. Br. Cause a Remover, pl. 46. cites 44 E. 3. 37. 48 E. 3. 20. and 49 E. 3. 21.

12. Where record is removed by foreign plea, it shall be at issue before the removal, and when it is removed, the Bank can do nothing but try this issue, and can not take plea to the writ after the last continuance. Ibid.

13. *Affise* in com. Warwick. The conufance was demanded by the mayor, &c. and in Coventry the tenant pleaded foreign plea, by which the parol was demanded before the justices of affise, but non patet how. It seems that this ought to be by re-attachment clearly to give the parties day in court, and this was the practice in the court of the bishop of Ely, who had conufance extra comitatum of Canterbury; the tenant in Ely pleaded *bastardy* in the plaintiff in *affise*, and the plaintiff said that he was mulier, and not bastard, and because the justices of the bp. did not write to the bp. the plea was remanded before the justices of *affise*, and the bp. demanded conufance again, but could not have it, quod nota. Br. Parol, or Plea remanded, pl. 3. cites 22 H. 6. 58.

14. The cause is traversable always where the nature of the land shall be changed, and where a third person is to be prejudiced, and not where it is removed out of one court of the king into another. Br. Cause a Remover, pl. 8. cites 34 H. 6. 48.

15. To the demand of conufance upon the original the demandant may say that the land is out of the franchise, and join issue; quod nota. Br. Conufance, pl. 5. cites 34 H. 6. 53.

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16. In *precipe quod reddat* the tenant is *essoined*, and no challenge entered to claim any conufance of plea there, at the day of *essoins*, if he demands conufance he shall not have it; for the court is *seised* without challenge; quod nota. Br. Conufance, pl. 6. cites 35 H. 6. 24.

* S. P. Br.
Cause a Re-
mover, pl. 8.
cites 35 H. 6.
24. and 54.

17. And after * *issue* was taken that the land is out of the franchise, by reason that a challenge of the franchise at the day of *essoins*, and was found upon the remembrance of the clerk of *essoins*, and the tenant demanded the view, and could not have it, because this issue shall be first tried, by which the tenant was compelled to join to the one or the other, and so he did to the demandant. Ibid.

18. Trespas against the abbot of B. who who appeared by one attorney as party, and appeared by another attorney, and said, that the place where, &c. was within his liberty, &c. and demanded conufance of the plea before his bailiff, by which day was given to be advised, and at the day he demanded conufance to be allowed; and per Moyle, he ought to shew cause, and also he has lost it by reason of the day which was given over; but per Prisot, Ashton, Danby, Davers, and Needham, conufance shall be granted; for the day given [does not] oust the matter, because he challenged it before, and also it is of record here, that the liberty has been at another time allowed; for to the first demand of the conufance he shall shew cause, as letters patents of the king, &c. and

and writ of allowance, which ſhall be entered of record, and then this ſuffices after, upon which, by Priſot, he ſhall have conuſance, quod Curia conceſſit, though he was party, for his bailiff or ſteward before whom, &c. may be indifferent, as the juſtices are between the king and party, and if not, it is a failure of right, and the party may have reſummons, by which, the defendant traversed the cauſe, and ſaid, that the place is out of the liberty, &c. and held there that the defendant ſhall join to the one or to the other. Br. Conuſance, pl. 7. cites 35 H. 6. 54.

19. He who has conuſance of pleas may demand the conuſance in perſon, or by bailiff, or by attorney, but the bailiff cannot make attorney to demand conuſance for his maſter; contra of the immediate attorney of the maſter. Br. Conuſance, pl. 50. cites 6 H. 7. 9.

20. The king granted to the burgeſſes of Pomfret, that they ſhall implead before themſelves, and that no burgeſſes ſhall implead another of any thing done in P. but in the ſame vill, and that they ſhall not be impleaded in another place, but there of any thing done there, and in treſpaſs againſt A. D. he ſaid, that he was burgeſſes of P. and that it appeared that the treſpaſs was done in P. as appears in the declaration, judgment of the writ; and by judgment the writ was abated; quod nota; and it was not by demand of conuſance, but by plea of the burgeſſes, and per Keble, this judgment ſhall ſerve all other burgeſſes hereafter without ſhewing their charter again. Br. Conuſance, pl. 52. cites 9 H. 7. 12.

21. When a lord demands conuſance of pleas, day ought to be given to the franchise, otherwiſe it is a diſcontinuance of the niſi prius; for there ought to be a ſpecial day for the parties here to hear judgment in this. Lane, 81. Arg. cites 10 H. 7. 26. [but it ſeems that the book is miſcited.]

Lane, 89.
Arg. ſays,
that this is
where the
plea is to be
ſent into an-
other court,

as Durham, &c. where the parties had no day before, and that there a day ought to be given, See Fiſh. Jour, pl. 17. Mich. 14 E. 3.

22. In an action brought againſt an attorney of C. B. for aſſaulting the plaintiff in the city of Wells, the biſhop of Bath and Wells, by his attorney demanded conuſance of all pleas of land, &c. within the ſaid city and liberty of Wells, and of all perſonal pleas of debt and treſpaſs, &c. granted by King E. 4. to the then biſhop of Bath and Wells, and his ſucceſſors, and alſo ſhewed letters patents of Q. Eliz. in confirmation of the ſaid grant of E. 4. and alſo her cloſe writ directed to the juſtices to permit him to enjoy his liberties, and thereupon the conuſance was allowed. Bendl. 233, 234. pl. 262. Mich. 16 Eliz. Whoper v. Harewood.

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23. On a plaint levied in Yarmouth againſt T. S. he was committed, and being removed into B. R. by habeas corpus cum cauſa, the plaintiff ſhewed a charter granted to the bailiffs of Y. that every perſon of that place ſhould be impleaded there, and not elſewhere, and prayed a procedendo, but it was denied, becauſe B. R. cannot be ouſted of their juriſdiction without ſome matter of diſcharge pleaded and recorded, and this habeas corpus being directed to the bailiffs, &c. they might as well have returned this charter as the cauſe, and then the procedendo ſhould be granted; but by their

not doing so, they have lost that advantage. Roll. Rep. 232. pl. 1. Mich. 13 Jac. B. R. Sterling's case.

24. It seems, that the conusance is *demandable* by the lord of the franchise, and *not pleadable* to the jurisdiction by the party. Lev. 89. Hill. 14 & 15 Car. 2. B. R. obiter.

25. The *warrant of attorney* to demand conusance *ought to be filed in court*. Lev. 89. cites Pasch. 18 Car. 2. B. R. per Cur.

2 Keb. 26. pl. 54. S. C. accordingly, and if he do not keep his day the party may return.

26. In case of conusance *where the lord is party*, entries shall be made on the roll of the day and place when he will try the cause before his steward; per Cur. agreed. Sid. 283. pl. 16. Pasch. 18 Car. 2. B. R. Grange v. Simpson.

1 Salk. 183. pl. 1. S. C. —Carth. 109. S. C.

27. In *ejectment for lands in the isle of Ely*, after not guilty pleaded it was suggested on the roll, the privilege of the county palatine, that no jury should be returned out of the isle, and so a *venire facias* was prayed to R. the next vill in the county of Cambridge, *et quia videtur justiciarius hic rationi consonans ei conceditur*; it was objected, that the defendant's confession should have been entered likewise on the roll, (*viz.*) *et quia defendens hoc non dedit ideo ei conceditur*, but adjudged, though some precedents are so, yet either way is well enough; for if the fact is otherwise, he may bring a writ of error, and assign it for error. 3 Salk. 110. pl. 1. Hill. 2 W. 3. B. R. Cotton v. Johnson.

Carth. 109. S. C. the plaintiff had judgment.

28. Then it was objected, that the entry ought to have been *quod liberi tenentes nec residentes in eadem insula non aggredi debent ad aliquam juratam extra libertatem illam faciend'*; for otherwise it doth not appear to be a privilege annexed to the inhabitants, but a mere cognizance in the bishop; however, the trial being in the county of Cambridge, of which this is parcel, the court held it to be aided by the statute 16 & 17 Car. 2. cap. 8. 3 Salk. 110. pl. 1. Hill. 2 W. 3. B. R. Cotton v. Johnson.

29. *Ejectment in court of Ely removed by certiorari*, Serjeant Wright demands conusance for the bishop of Ely, being a royal franchise, and Stone had a warrant of attorney for that purpose; Holt said, *there must be a new declaration in this court, and then after the defendant's appearance, the conusance is to be demanded*, for the defendant may counterplead the conusance, but if he will not appear you may have a procedendo; we must have a roll made of it, that the Court may be possessed, then we appoint a day upon the roll, and *if you do not hold your next assize, you lose your conusance*, it is a continuance [discontinuance] of your plea. Day was given to shew cause why there should not be a procedendo. Comb. 319. Hill. 6 W. 3. B. R. Wild v. Villers.

30. One may *prescribe* to hold pleas, but not to have conusance of pleas; for that excludes other jurisdictions; per Holt Ch. J. Cumb. 282. Trin. 6 W. & M. in B. R. in case of Millard v. Cole.

[596] Ld. Raym. Rep. 475. Trin.

31. In *trespass quare clausum fregit removed by certiorari into B. R. and bail put in*, conusance was demanded for the bishop of Ely; and first, the *warrant of attorney under the bishop's seal was*

read in Latin, and then the record as it was, viz. *trespaſs*, &c. and then the record proceeded, *et modo ad hunc diem venit* Simon Episcopuſ Elienſiſ per Johannem Stone attornatum ſuum, & petit cognitionem, &c. *qui dicit, that the place where, &c. is within the liberty of the biſhop; & quod alias, ſcilicet, Mich. 20 Edw. 3. B. R. Rot. 44. in trespaſs and battery, and Hill. 21 E. 3. Rot. 21. B. R. in trespaſs, quare, &c. and Hill. 17 & 18 Car. 2. Rot. 229. B. R. in trespaſs and ejection, and Mich. 35 Car. 2. B. R. Rot. 151. in trespaſs, aſſault, and battery, this conſuſance was allowed, and he prays his privilege habendi cognitionem, and then the entry proceeds, queſtitum eſt of the plaintiff, ſi quid dicere queat, &c. ſuper quo allocatur, &c. and then day is given upon the roll to the parties at Ely, & dictum eſt to the biſhop quod celeris juſtitia fiat.* The two late records were produced, in court, but becauſe the old records were not produced, and becauſe it was the laſt day of the term, and therefore unfit for ſuch a motion, and becauſe Holt Ch. J. doubted of the manner, it was adjourned; for Holt Ch. J. ſaid that the true method of pleading ſhould be, to lay uſage immemorial, and not to rely upon it, but to produce the allowance in B. R. or in eyre, and this is agreeable to the reaſon of the law; for ſince ſuch privileges do not lie in preſcription, but in grant, that alone cannot be a title to them, but becauſe that if the charter was before time of memory, &c. before the firſt of R. 1. the ſaid charter could not be pleaded, therefore by the ſtatute of quo warranto, 18 E. 1. one may lay a uſage, which is an argument of an ancient grant time whereof, &c. and then ſhew the allowance; but if no ſuch uſage hath been, then the preſumption of the law is deſtroyed, and they muſt ſhew the patent; for allowances in B. R. or in eyre are not pleadable. See *Foſter v. Mitton*. See *Kelw. 189, 190. 1 Sid. 103.* It will be difficult to maintain this method of pleading. In the caſe of 17 & 18 Car. 2. Holt ſaid, he remembered, that no exception was taken to the manner of the demand. Adjourned. *Ld. Raym. Rep. 427, 428. Hill. 10 W. 3. Foſter v. Hexham.*

ances, but they might have pleaded but one only, and have relied upon it, and cited accordingly. For if a franchise lies in grant, and cannot be claimed by preſcription, the allowance in B. R. or eyre, or confirmation by patent, will be ſufficient.——1 *Salk. 183. pl. 2. Foſter v. Mitton.* S. C. but no judgment.——Conſuſance was prayed for the univerſity of Oxford, becauſe the defendant was a gent. commoner of Magdalen-hall, upon producing the chancellor's certificate, &c. and a rule was made to ſhew cauſe; and July 2. Trin. 1728, the rule was diſcharged. There was no ſuggeſtion nor entry of the claim made upon record. Cited *Ld. Raym. Rep. 428. Paſch. 1728, as between Coote and Graham, and Paternoſter v. Graham.*

32. The lord only can take conſuſance of pleas, and neither the plaintiff nor defendant, for he cannot plead it to the juriſdiction of the Court, but the lord of the franchise, by his bailiff or attorney, muſt come in and claim the franchise; and though the lord ought to have the action, yet this court is not ouſted by it, but the plea remains under the controul of this court; for day is given here upon the roll to the parties to be in the inferior court at a day certain, and the parties are commanded there, and the tenor of the record of this court is ſent for the inferior court to proceed, and if juſtice is done there, all is well, but the record is here; and if

11 W. 3. S. C. was moved again, and then the conſuſance was allowed niſi, &c. and Holt Ch. J. demanded a fight of the record of the caſe in E. 3. but they had only a copy of it; upon which Holt ſaid, that the record itſelf ſhould have been in court, where the judgment is grounded upon the record, as it is here, the entry being inſpectis record', &c. and he ſaid, that the demand ought to be entered as of Hill. term, and ſo continued, by Curia adviſare vult, &c. and he ſaid, that they had no need to have pleaded ſo many allow-

12 Mod. 643. S. C. and by Holt Ch. J. the courſe is, for the lord of the franchise by himſelf, his bailiff, or attorney, to come into the ſuperior court, and produce his

charter of
conufance,
or, if it be
very ancient,
to fhew an
allowance of
it in that
court, and
pray conu-
fance; and
upon allow-
ance of his
claim, the
Court above
appoints him
a day to bold
th.s court on,

justice is not done there, as if the Court there does not proceed upon the day prefixed, or if the judge misbehaves himself, &c. the plaintiff shall have a *refummons*; and it is the benefit of the lords only, that it is confidered in this matter; per Holt Ch. J. * 2 Lord Raym. 836, 837. Mich. 1 Ann. in cafe of Crofs v. Smith.

33. But he faid, that thefe jurisdictions were hardships to the fubject, and *allowed* by 27 H. 8. cap. 24. *rather for their antiquity than for any other reason*, and they were detrimental to the prerogative of the crown, and therefore certioraries were always allowed to prevent the grievances of thefe inferior jurisdictions. Ibid.

and directs the parties to go down on that day, *and if justice be not done below*, the record remaineth here above; fo that if justice be not done below, as if the defendant lives without the franchise, and has nothing within the franchise by which he may be fummoned, or that the judge does not do right, the plaintiff may come up and fhew this matter to the Court, and thereupon a *re-fummons* fhall go upon the record here, and the Court fhall proceed to do justice here.

(N) At what Time it is to be granted.

[1. CONufance shall *not* be granted *before the writ is ferved*, as if the defendant fays in an affife, that he was not attached by fifteen days, conufance shall not be granted. 13 H. 4. 11.]

Fitzh. Co-
nufans,
pl. 22. cites
S. C.—
Br. Conu-
fans, pl. 21.

[2. Conufance shall *not* be granted *till* the defendant has made *defence*, for if he will not make defence, the plaintiff fhall take advantage againft him for his want of defence. 14 H. 4. 20.]

[3. In trefpafs againft two, if *one makes default*, and *the other appears and pleads*, and conufance is demanded, yet it shall *not* be granted *till the other appears*, for upon a bill or writ, the Court cannot grant conufance in part. 22 Aff. 50. adjudged.]

IV. In formedon, *the tenant was effoined, and day given till octob. Mich. at which day conufance of the plea was granted* to the bailiffs of E. quod nota, *at the fecond day*, et non patet ibidem, for it was challenged at the firft day. Br. Conufance, pl. 19. cites 11 H. 4. 87.

[N. 2] [And how the Procefs, &c fhall be.]

Br. Execu-
tions,
pl. 121.
cites S. C.
& S. P. be-
caufe this is ap-
purtenant to cog-
nitio placitorum;
per Thorpe, Baf-
fet, and Hank.—
Br. Conufans,
pl. 38. cites
S. C. & S. P.
and for the fame
reason, and be-
caufe without that
conufance cannot
be made.—Fitzh.
Procefs, pl. 177.
cites S. C. & S. P.
and for the fame
reason.

[4. When a court holds plea upon conufance of a plea granted, the *procefs* againft the party shall be by *capias*, as other juftices do. 22 Aff. 61.]

Br. Execu-
tions, pl. 121.
cites S. C.

[5. And they shall award the *grand diftreffs*, if the caufe requires it. 22 Aff. 61.]

—Br. Conufans, pl. 38. cites S. C.—Fitzh. Procefs, pl. 177. cites S. C. and all for the fame reason.

[6. And

[6. And if he comes not, he shall *hve* his issues. 22 Aff. 61.] Br. Executions, pl. 121. cites S. C. — Br. Conufans, pl. 38. cites S. C. — Fitzh. Process, pl. 177. cites S. C. and all give the same reason.

[7. And if the party is *convicted*, he shall be *fined or imprisoned*, or shall be in * *mifericordia* of him to whom conufance is granted, if the case requires it, for without these, conufance would be of no effect. 22 Aff. 61.]

Fol. 496.
Br. Executions,
pl. 121.

cites S. C. — Br. Conufans, pl. 38. cites S. C. — Fitzh. Process, pl. 177. cites S. C. & S. P. and all for the same reason.

(N. 3) Allowed. In what Cafes.

1.]N affise, the bailiff of B. demanded conufance, and the *tenant* *faid in proper person, that the tenements were not within the franchise*, and the affise came ready to pafs upon this point, whether it lies within the franchise or not? and the tenant at another day was demanded and came by bailiff, and because this issue is between the bailiff of the franchise, and the tenant, out of the point of affise, it was advifed to the Court, that the *bailiff of the tenant cannot be party to this issue, by which the default of the tenant was recorded*, and it was demanded of the *bailiff* of B. what he has to shew to have conufance, and he *shewed record sub pede sigilli allowing it in affise in another county*; and it was faid that it is insufficient; for he might have it granted in one county and not in the other; also the claimer of conufance was of all his tenements within his fee, and the record did not make mention of fo large a claim, but against the plaintiff the tenant was by bailiff, but not against the bailiff of the franchise; and they were adjourned into Bank, and there he shewed charter, and had the conufance. Br. Conufance, pl. 43. cites 28 Aff. 13.

2. Where a man brings affise of *land, part in a franchise, and part out*, the writ shall abate, per Cur. Br. Conufans, pl. 23. cites 38 E. 3. 31.

3. Upon failure of right in a franchise, and a *refummons* sued, the court of the franchise shall never afterwards have conufance of that plea. Jenk. 34. pl. 66. cites 11 H. 4. 27. Fitzh. Conufance, 88.

4. Where the *superior court is seised* of the plea, conufance is not grantable. Jenk. 34. pl. 66.

5. Nor is it *grantable of a plea out of the county-court*; for this court cannot award a *refummons*. Jenk. 34. pl. 66.

6. If the king grants *cognitionem placitorum extra curiam suam* to *J. N. and his heirs*, and dies, there the grant is void, because he did not say *extra curiam suam & hered' suorum*, but there a *confirmation of the new king* will serve; but Brooke says, quære; for *mirum*, where the grant is void before by the death of the king who granted. Br. Conufance, pl. 63. cites 2 H. 7. 10.

7. Grant

Conusance of Pleas.

7. Grant of conusance of pleas *"before time of memory"* shall not be allowed at this day, if it *has not been allowed before in eyre*. Br. Conusance, pl. 65. cites 21 H. 7. 29.

8. And if it be granted in *B. and C.* and has been allowed in *B.* and not in *C.* it shall not be allowed in *C.* now, though the grant be intire; quod nota. Ibid.

[599] 9. Though the plaintiff and defendant are both inhabitants within the inferior jurisdiction, yet in all transitory actions it is in the plaintiff's election to suppose or lay it where he will, as well out of the jurisdiction as within it. Sid. 103. Hill. 14 & 15 Car. 2. B. R. Bishop of Ely's case.

10. Conusance is not to be allowed in any case, if it appears that by allowing it there would be a failure of justice; as when they cannot try the cause because it is local; but if this do not appear at the first, the cause shall be adjourned thither, and upon an erroneous and irregular proceeding, a resummons lieth; per Hale Ch. B. Hard. 507. Pasch. 21 Car. 2, in the Exchequer, in case of Castle v. Litchfield.

(N. 4) Allowed. How. And to what Court.
And the Effect thereof.

1. THE king grants conusance to *A.* of pleas arising within certain bounds; the king grants to *B.* the like conusance within the same bounds. *C.* brings a præcipe quod reddat against *D.* for land within those bounds; both *A.* and *B.* claim conusance; the demandant and tenant agree to the conusance, but the tenant did not join with either of the patentees. This controversy between the patentees shall not be tried in this case, because of the delay of the demandant, which such trial would occasion; but by all the counsel, the conusance in this case shall be granted to him who first demanded it, and the right of the said patentees shall be tried in another action between them. Jenk. 19. pl. 36. cites 20 E. 3. Fitzh. Conusance, 46.

2. Upon conusance granted, the original shall not be removed out of the superior court, nor shall the record, but only a transcript, so that upon a resummons, upon a failure of justice in the inferior courts, the superior court may proceed; by all the counsel. Jenk. 31. pl. 61. cites 26 Ass. 24.

3. At the nisi prius of tenements in *W.* the bailiffs of *W.* said, that the king by charter, which they shewed, had granted that no inquest should be taken of land in *W.* but within the same vill, and prayed that they should not take the inquest contrary to the charter. Stouff. said, this ought to have been claimed in Bank; for we have no warrants in the writ of nisi prius to go to *W.* to take it, but to *N.* by which they took the inquest. Br. Conusance, pl. 44. cites 29 Ass. 13.

4. In præcipe quod reddat, the tenant made attorney, and after conusance of plea is granted, there the attorney shall remain of record in

in the franchise, and shall be effoined there, and not the tenant; and fo fee that the intire record is fent to the franchise, and not the original only. Br. Conufance, pl. 64. cites 40 E. 3. 11. and 21 E. 3. 45. accordingly. But *contra of that which is in the franchise, and removed into Bank.*

5. Note, by all the iuftices, that conufance of pleas, or other thing once allowed, *fhall bind the king till reverfed.* Br. Conufance, pl. 54. cites 13 E. 4. 5.

6. Conufance may be demanded by attorney; per Curiam. Br. Conufance, pl. 51. cites 9 H. 7. 10. The demand by an attorney is not

good if he has not a warrant of attorney in Latin, for warrant of attorney in Englifh is not allowable in fuch cafe. Sid. 103. Hill. 14 & 15 Car. 2. B. R. Bifhop of Ely's cafe.

And the attorney muft have his warrant in court, and it is not fufficient for him to fay that it is in his chamber. Sid. 103. Bifhop of Ely's cafe.

* Conufance of pleas cannot be pleaded by a defendant, but muft be demanded by the lord of the franchise, his bailiff, or attorney; per Holt Ch. J. 12 Mod. 666. Hill. 13 W. 3. in cafe of Taylor v. Reynolds. * [600]

7. A charter by which conufance was demanded bore *tefte in the time of William the Conqueror*, before time of memory, and though it had been allowed in C. B. yet becaufe it had not been allowed in *eyre*, it was difallowed. Br. Conufance, pl. 51. cites 9 H. 7. 10. [12. a. at the end of pl. 6. the Abbot of Battle's cafe.] 16 H. 7. 16. b. pl. 17. Trin. 16 H. 7. S. P. as to its being allowed in C. B. and not in B. R. per Hufsey.

8. No court can demand conufance *unless* it be of record, becaufe all courts of record are the king's, though another may have the profits of them. Co. Litt. 117. b. So that although the caufe goes out of the king's courts at Weftminfter, yet it goes to another of the king's courts, to which he has granted the privilege of determining the caufes arifing within a limited jurifdiction; but it is below the dignity of the king's courts to part with any caufe to another's court, fuch as the county-court, &c. Gilb. Hift. of C. B. 155. and cites 2 Infl. 140.

Gilb. New Abr. 560. S. P. in totidem verbis, and cites fame cafes.

E R R A T A.

Page 469, line 22. *for* against the 2d. *read* against the 3d.
Ibid. —ult. *for* taken miscontinued but not miscontinued,
read taken to be miscontinued but not discontinued.
482, —18. *for* Mich. 13 W. 2. *read* Mich. 13 W. 3.



